IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-438

ROLAND MCMASTERS, JACK SMITH, JR., WAYNE TURNER, ARLYN WADHOLM AND RUSSEL PEDERSON, *Petitioners,*

v.

BEULAH CHASE, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

THOMAS M. BEYER
17 Second Avenue West
Dickinson, North Dakota 58601
Attorney for Petitioners

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Roland McMasters, Jack Smith, Jr., Wayne Turner, Arlyn Wadholm and Russel Pederson petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Appendix A, *infra*) is reported at 573 F.2d 1011. The initial decision of the United States District Court for the District of North Dakota, denying Plaintiff's Motion for Preliminary Injunction, is reported at 405 F. Supp. 1297, and is set out in Appendix B, *infra.* The subsequent decision of the

District Court, a dismissal on the merits, from which appeal was taken, is unpublished, and is set out at Appendix C, *infra*.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit, entered April 5, 1978, affirmed on other grounds the order denying relief entered by the United States District Court for the District of North Dakota on February 14, 1977. The United States Court of Appeals for the Eighth Circuit denied petitioners' motion for a rehearing on May 15, 1978. On June 1, 1978, enforcement of the judgment was stayed until July 1, 1978, to allow the petition for certiorari to be filed with this Court. On July 10, 1978, the stay of mandate was extended for an additional sixty days, and thereafter, upon filing of the petition for writ of certiorari, until final disposition of the matter by this Court.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I. Whether the court below utilized the proper scope of review in examining agency action.

II. Whether the United States can accept fee title to land from an Indian, so that the land can be held in trust status by the United States under 25 U.S.C. § 465, for the sole purpose of avoidance by the Indian of the payment of state and local taxes.

III. Whether a cause of action based solely on an alleged deprivation of a federal statutory right is within the scope of 42 U.S.C. § 1983.

IV. Whether a pre-emption analysis can be applied where there is no state or local regulation or other affirmative conduct conflicting with the federal statute or policy at issue in this case.

STATUTES INVOLVED

The statutes at issue in the present case are section 5 of the Indian Reorganization Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. § 461 *et seq.*, and 42 U.S.C. § 1983.

Section 5 reads as follows:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.
>
> For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.
>
> The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

> Title to any lands or rights acquired pursuant to sections 461, 462, 463, 464, 465, 466-470, 471-473, 474, 475, 476-478, and 479 of this title shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

The text of 42 U.S.C. § 1983 is as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT

The City of New Town, North Dakota, is a municipality organized under the laws of North Dakota and is located within the boundaries of the Fort Berthold Reservation. On August 9, 1974, respondent Beulah Chase, an enrolled member of the Three Affiliated Tribes, and her husband, John, purchased a lot of land within the city limits from the City of New Town. A warranty deed to the land was issued to respondent by the City on August 23, 1974. The purchase price was $1102, including $702 in payment of special assessment charges for construction of water and sewer lines, and a water treatment plant.

On June 23, 1975, respondent conveyed title to the lot to the United States in trust for herself. Acceptance of the conveyance, pursuant to 25 U.S.C. § 465, was approved on October 14, 1975, by the Area Director, Aberdeen Area Office, Bureau of Indian Affairs, United States Department of the Interior.

After the conveyance in trust, respondent applied to the City Council for connection of the lot to City water and sewer lines. On September 29, 1975, respondent was informed that the water and sewer connection would not be made while the lot was held in trust status.

On October 10, 1975, respondent filed suit in the United States District Court for the District of North Dakota, against the mayor and councilmen of New Town, individually and in their official capacities, asserting a cause of action under 42 U.S.C. § 1983 and § 1985(3), and seeking declaratory, injunctive, and monetary relief.

Respondent's Motion for a Temporary Restraining Order was denied on October 14, 1975. Her Motion to Reconsider the Denial of the Motion for a Temporary Restraining Order, filed October 28, 1975, was denied on November 17, 1975. Respondent's Motion for a Preliminary Injunction was denied on December 20, 1975.

On February 14, 1977, respondent's Motion for a Permanent Injunction was denied, the court holding that respondent had not shown either racial discrimination on the part of petitioners, or interference through their actions with a constitutionally protected right. The District Judge issued a letter on March 8, 1977, clarifying his previous order to indicate that the claims for declaratory relief and damages were likewise dismissed.

An appeal to the United States Court of Appeals for the Eighth Circuit was filed on March 16, 1977. The Eighth Circuit issued its decision on April 5, 1978,

holding that the acceptance in trust of the lot was proper under 25 U.S.C. § 465; respondent had a cause of action for damages under 42 U.S.C. § 1983; the City's withholding of water and sewer service was invalid under the Supremacy Clause of the United States Constitution as an interference with a federal right conferred on respondent by 25 U.S.C. § 465; and, finally, petitioners were not liable in damages to respondent because of their qualified immunity.

The federal questions were first raised in the district court by Plaintiff's Complaint, filed October 10, 1975, and Defendants' Answer, filed November 10, 1975. Those same questions formed the substance of respondent's appeal to the Eighth Circuit, filed March 16, 1977.

The statutes involved, 25 U.S.C. § 465 and 42 U.S.C. § 1983, have been at issue throughout these proceedings, and both courts below have interpreted them in making their determinations.

REASONS FOR GRANTING THE WRIT

I. The Eighth Circuit decision below holds that local municipalities must provide certain municipal services to trust lands acquired pursuant to 25 U.S.C. § 465, and that such trust lands may not be taxed or regulated in any manner by state and local governmental units.[1]

[1] This latter holding was primarily based on *Santa Rosa Band of Indians* v. *Kings County*, 532 F.2d 655 (9th Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977). App. A at 10a. Apart from the fact that the conclusions drawn in *Santa Rosa* concerning jurisdiction were without foundation, it should be observed that *Santa Rosa* involved attempted land use regulation of trust land within a reservation. The original boundaries of the Fort Berthold Reservation, upon which respondent held her trust land, were found to have not been disestablished in *City of New Town, North Dakota* v. *United States*, 454 F.2d 121 (8th Cir. 1972). The *New Town* decision, however, relied upon case law which is presently without force. After that case was decided, this Court decided *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977), and *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975). The *Rosebud* and *DeCoteau* decisions now provide the framework in which reservation boundary questions must be analyzed, and those boundary decisions predating these cases, including City of New Town, should be reexamined. *See Puyallup Tribe Inc.* v. *Department of Game of State of Washington*, 97 S. Ct. 2616, 2621, n. 11 (1977) (validity of reservation boundary decision antedating *DeCoteau* and *Rosebud* questioned).

Both holdings may have a devastating impact upon states and local units of government. If municipal services must be provided to § 465 trust lands, those same services may have to be provided to all trust land regardless of whether such land is acquired pursuant to § 465. Additionally, these services will be provided to those over whom the state or municipality can exercise neither regulatory nor taxing control.

In addition, the lower court has upheld agency action in this case without allowing the administrative record for such action to be scrutinized. This validation of agency action is in derogation of the principles established by this Court for judicial review. In finding that the agency acted properly in acquiring land for the respondent under § 465, the court held that an individual Indian could convert fee land into trust status to avoid the payment of taxes. Such an acquisition is clearly unauthorized, as is discerned from a reading of the legislative history and contemporaneous administrative interpretations of § 465. This interpretation both conflicts with that of the United States District Court for the District of Columbia, and expands the class of intended beneficiaries of the statute beyond that designated by Congress.

The jurisdictional scope of § 465 is an issue of national importance. Both the City of Tacoma, Washington, and the City of Sault Ste. Marie, Michigan, have been compelled to file suit against the Secretary of the Interior in United States District Court for the District of Columbia for a judicial resolution of this problem. *City of Tacoma* v. *Andrus,* No. 77-1423 (D. D.C., complaint filed Aug. 17, 1977); *City of Sault Ste. Marie* v. *Andrus,* No. 77-1388 (D.D.C., complaint filed Aug. 9, 1977). Apart from the jurisdictions presently litigating the scope of § 465, there are many governmental subdivisions similarly situated. That this issue is one of national concern is evinced by the National Association of Counties' American County Platform Statement on Indian Affairs and Resolution on Indian Affairs which were adopted July 11, 1978. Despite the adverse consequences to states and their local units of Government from the acquisition of § 465 trust lands, the federal officials who have the authority to remedy the situation have recently proposed regulations which would serve to give the Secretary unlimited authority to acquire land under the statute. 43 Fed. Reg. 32,311 (1978). Until this issue is resolved, states, cities, and counties will be left in a chaotic state of jurisdictional uncertainty.

The court below has also apparently broadened the parameters of § 1983 by finding that any Indian claim stemming from the federal "guardian-ward" relationship is one of constitutional dimension for the purposes of that statute. Once found to be a claim actionable under § 1983, the court employed a pre-emption analysis, which was unwarranted by the facts of the case, to avoid having to analyze the case in an equal protection context.

This Court should grant certiorari to properly apply the law to the facts of this case, and, thus, negate the wide-ranging, adverse consequences to states and their local governmental subdivisions.

II. A basic defect in the opinion of the court below is the standard of review employed. In essence, the Eighth Circuit conducted a *de novo* review of the propriety of the acceptance in trust under § 465 of respondent's tract. Petitioners' position, however, is that *de novo* review was inappropriate in this case, and, even assuming that the Eighth Circuit properly approached the construction of § 465, the court's application of its own statutory standard should have been limited to consideration of the facts involved in the acceptance in trust as revealed by the administrative record alone. However, since the administrative record was not before the court, it was precluded from reaching a decision on the merits and was required instead to remand the case to the district court for reconsideration of the case in light of the circuit court decision as applied to the administrative record.

Although this case was not specifically brought under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, it does involve examination of action by a federal agency, and thus, the judicial standards which have developed for review of agency action are equally applicable in the present context. Most relevant to this case is this Court's discussion of the scope of appellate review in *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.,* 423 U.S. 326 (1976), where it was stated that

> ordinarily review of administrative decisions is to be confined to "consideration of the decision of the agency . . . and of the evidence on which it is

based." *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709, 714-715, 83 S. Ct. 1409, 1413, 10 L.Ed.2d 652 (1963). "[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp* v. *Pitts*, 411 U.S. 138, 142, 93 S. Ct. 1241, 1244, 36 L.Ed.2d 106 (1973). If the decision of the agency "is not sustainable in the administrative record made, then the . . . decision must be vacated and the matter remanded . . . for further consideration." *Id.* at 143, 93 S. Ct. at 144.

Id. at 331. In fact, petitioners' position that *de novo* review is inappropriate except in very limited circumstances is by now a well-settled principle that has frequently been reiterated by this Court. *E.g., Camp* v. *Pitts*, 411 U.S. 138 (1973); *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971).

The court below, however, seems to have ignored the explicit dictates of case law, and, in its decision, conducted a *de novo* review of the acceptance in trust.[2] In so doing, the court also ignored a more general principle not limited to cases involving examination of agency action; that is, that inadequacy of the record in the district court requires remand for proper disposition of the case, since the Court of Appeals "must not be understood as even intimating that [it] can engage in the fact-finding process at the Appellate level." *Hill York Corp.* v. *American International Franchises, Inc.*, 448 F.2d 680, 691 (5th Cir. 1971). *See also, Public Affairs Associates, Inc.* v. *Rickover*, 369 U.S. 111, 113-114 (1962); *Women Strike for Peace* v. *Hickel*, 420 F.2d 597, 603-604 (D.C. Cir. 1969).

[2] The Court of Appeals did indirectly address the issue of the proper scope of review. App. A at 4a, n. 3. However, as revealed by its citation to *Mescalero Apache Tribe* v. *Hickel*, 432 F.2d 956 (10th Cir. 1970), *cert. denied*, 401 U.S. 981 (1971), the court's statement related only to the necessity of exhaustion of administrative remedies, an issue wholly distinct from the requirement that judicial review of administrative action be limited to the administrative record. While exhaustion was concededly not required in the present case, the factors which lead to that conclusion have little bearing on the appropriate scope of judicial review. *Mescalero Apache Tribe* v. *Hickel, supra*, thus provides no support for the court's implied assumption that it could properly conduct *de novo* review of the acceptance in trust in the present case.

The appropriate course of action would thus have been to remand the case to the district court for consideration of the administrative record in light of the Eighth Circuit's opinion. The district court, if necessary, could then have required joinder of the appropriate agency officials, pursuant to Rule 19(a) of the Federal Rules of Civil Procedure and 5 U.S.C. § 702. The Eighth Circuit's failure to remand makes its disposition of the case procedurally defective, and thus heightens the propriety of review by this Court of the decision below.

III. The court below held that under 25 U.S.C. § 465 the Secretary of the Interior is authorized to accept in trust land already held in fee by an individual Indian. In reaching this conclusion, the court stated that a contrary interpretation was not required either by the language of the statute or its legislative history, yet the court in fact did no more than a cursory analysis of the legislative history and statutory language, and relied on only one case, *Board of Commissioners* v. *Seber*, 318 U.S. 705 (1943), which involved construction of a statute crucially different from § 465.

There is no indication in the Eighth Circuit opinion that the court examined the legislative history relevant to the § 465 land acquisition provision. If the court

had made such an analysis, it could only have concluded that acceptance in trust of land already held in fee by the intended trust beneficiary is outside the intended scope of § 465.

The relevant legislative history is replete with statements indicating that the purpose of § 465 was to alleviate the dire economic situation of landless Indians by acquiring new land for their benefit. For example, Representative Hastings commented on the provision in the original Senate bill [3] as follows:

> Title III is entitled "Indian lands", and without analyzing it in detail, it authorizes an appropriation of $2,000,000 annually with which to buy additional lands for the use and benefit of members of the respective chartered communities. I have indicated, and I repeat now, that I am in sympathy with the purchase of additional lands for indigent, landless, and homeless Indians. Congress has appropriated money on a number of occasions to purchase lands for the landless Indians in California. There is no reason why this policy should not be enlarged and extended to other Indian Tribes . . .
>
> Let me repeat that I favor any adequate appropriation to buy lands for the support of landless and homeless Indians, whether they are improvidently dispossessed of their lands or whether they were born since the lands were allotted, and therefore not enrolled. . . .

78 Cong. Rec. 9268-9269 (1934).

Hastings, a critic of the self-government provisions of the bill, later reiterated his support and understanding of the land acquisition provision:

[3] The land acquisition provision, eventually enacted as Section 5, remained essentially unchanged through various revisions of the bill.

> I emphasized then that I had no objection to additional appropriations to purchase land for the old and poor and landless Indians, if bought for their benefit in the nature of Indian subsistence homesteads without the self-government features.

78 Cong. Rec. 11738 (1934).

That Congress' concern was with providing new lands for landless Indians is reinforced by numerous references by the House sponsor of the bill to the increasing numbers of impoverished landless Indians:

> In 1887 there were less than 5000 landless Indians. Today there are more than 100,000. . . .
>
> As the Indian estate has dwindled, Indian poverty and pauperism have increased alarmingly. It is estimated that there are now more than 100,000 landless Indians, a number which will inevitably and rapidly increase as long as the present system operates to deprive them of land and home. These landless Indians, in Nebraska, in the Dakotas, Minnesota, Michigan, Wisconsin, California, Nevada, and many other States, constitute a tragic problem in destitution and an acute problem of social relief which neither the Federal Government nor the States are adequately dealing with.

78 Cong. Rec. 11726, 11728 (Rep. Howard) (1934).

Senator Wheeler, the bill's other sponsor, echoed this concern:

> But what has happened is that the Government has been in a position where it could sell these lands. Now the Government seeks to stop that, because of the fact that these poor, unfortunate Indians are being found landless. The Government has taken the lands and sold them to white people, and then the Indians have been absolutely

> at the mercy of the white people, have been poverty stricken.

78 Cong. Rec. 11134 (1934).

In addition to overlooking these expressions of Congressional intent, the court below further misconstrued § 465 in its consideration of that provision in the context of the entire statute. That is, the court regarded § 465 as part of a new federal policy, embodied in the Indian Reorganization Act, to prevent further alienation of Indian lands caused by the allotment system previously in force. App. A. at . The Court is indeed correct in its statement that land consolidation was one purpose of the Indian Reorganization Act. However, the court fails to recognize that that purpose was to be implemented through sections 1-4 of the Act, and that section 5 was directed to a distinct, although related, purpose: acquiring land holdings for landless Indians.

The legislative history quite clearly reflects this duality of purpose. In floor debate on the bill, Senator Wheeler characterized its purposes as follows:

> First, to stop the alienation, through action by the Government or the Indians, of such lands, belonging to ward Indians, as are needed for the present and future support of the Indians . . .
>
> The second purpose is to provide by the acquisition, through purchase, of land for Indians now landless who are anxious and fitted to make a living on such land. The Commissioner of Indian Affairs and the Bureau of Indian Affairs have found that there are many Indians who have no lands whatsoever, and are unable to make a living. Consequently, the Government is constantly compelled to furnish money to these Indians. It is thought by

> the Government that it would be much cheaper in the long run and would make better citizens of them if we could put them on small tracts of land where they could make their own living.

78 Cong. Rec. 11123 (1934).

Representative Howard was even more emphatic when he outlined the major thrust of the bill before the House. After summarizing the purposes of sections 1-4, Howard continued:

> Section 5: The sections mentioned are designed to prevent further loss of Indian land. But prevention is not enough. The Indians now landless must be provided for. This section undertakes to do this gradually through an annual appropriation for the purchase of land.

78 Cong. Rec. 11727 (1934).

Later in the same series of remarks, Representative Howard reiterated that the intended effect of section 5 would be to promote the economic welfare of landless Indians, and reduce Government expenditures on their behalf, through acquisition by the Secretary of the Interior of new lands for their benefit.

> The preceding sections [Secs. 1-4] are safeguards to prevent further loss and wastage of Indian lands. But we must go further and actually restore some of the lost lands to the Indians. Section 5 sets up a land acquisition program to provide land for Indians who have no land or insufficient land, and who can use land beneficially . . . .
>
> I have already said that there are more than 100,000 landless Indians in America today . . . This program would permit the purchase of land for many bands and groups of landless Indians and would permit progress toward the consolidation of badly checkerboarded Indian reservations . . .

> [I]t is moreover an investment that will many times repay itself by taking Indians off the relief and ration rolls.

78 Cong. Rec. 11730 (1934).

This distinct duality of purpose has recently been recognized by the District Court for the District of Columbia in *City of Tacoma* v. *Andrus*, No. 77-1423, (D.D.C. Jan. 20, 1978) (Gesell, J.), App. G. The court there stated that acceptance in trust of land already held in fee by an individual competent Indian "would make a mockery of a statute obviously designed to augment, not merely transform, title to land available to Indians." App. G at . The court further rejected an argument that such a taking is valid because it comports with the Congressional purpose of preventing further alienation of Indian land, noting that

> [t]hat purpose, however, was addressed in Sections 1-4 of the Act, not Section 5 under whose authority the Secretary purports to operate. Sections 1-4 deal with the alienation problem by prohibiting transfers and allotments of Indian land, extending indefinitely the trust status of all restricted lands, and returning certain "surplus" lands to tribal sovereignty. 25 U.S.C. §§ 461, 462, 463, 464 (1970). Section 5 was adopted for a different, albeit complementary purpose.

App. G at .

The final House Committee Report on the bill contains a concise summary of the thrust of each provision, and characterizes § 465 as follows:

> Section 5 authorizes the Secretary of the Interior to purchase or otherwise acquire land for landless Indians.
>
> The title to land thus acquired will remain in the United States. The Secretary may permit the use and occupancy of this newly acquired land by landless Indians; he may loan them the money for improvements and cultivation, but the continued occupancy of this land will depend on its beneficial use by the Indian occupant and his heirs.

H.R. Rep. No. 1804, 73d Cong., 2d Sess. 7 (1934).

The reiteration in the Report of the statutory language, coupled with the condition that "beneficial use" of the land so acquired is a prerequisite to its continued occupancy by the Indian beneficiaries, indicate that § 465 was regarded as a type of self-help measure designed to benefit landless Indians who were seen as unintentional victims of the federal allotment policy.

The various committee hearings on the bill reflect this interpretation. In his testimony before the Senate Committee, Commissioner Collier, the primary Administration spokesman for the bill, consistently noted the distinct purposes embodied in the bill's land provisions. For example, Collier stated that

> [t]his bill takes its origin from the absolute necessity of in some way correcting the trend of the allotment, stopping the loss of the remaining Indian lands, making it possible to bring the remaining land into usable blocks, so that they can be effectively and economically operated. That is the purpose of this bill. *In addition*, the bill recognizes that if the Indians want to make a living on the land, they should be entitled to that land. It provides that land may be bought for them by the Government. It authorizes the appropriation of $2,000,000 a year to buy land back for those Indians. (Emphasis added.)

Hearings Before the Committee on Indian Affairs, U.S. Senate, Part I, 73d Cong., 2d Sess. 31 (1934).

Later, commenting on the evils of the allotment policy, Collier emphasized that "through the workings of the allotment system a very great number of Indians have been rendered entirely landless." Senate Hearings, *supra* at 59 (Part II). This exchange followed:

> The Chairman: How do you propose to get land?
>
> Comm. Collier: That is the second feature. But I want to make clear that before we can hope to start in on any large scheme of acquiring new land we have got to get a system of holding the land that is different from this system . . . If we can see some sensible way of handling the allotted lands, then the thing to do is to proceed and buy land conservatively for the landless Indians who want to live on the land. The bill authorizes an expenditure of 2 million a year on the purchases of land. That is not the only string we have to our bow, but it is the most important string.

Id.

Collier later reiterated the dual purposes embodied in Title III, stating that it endeavors

> first of all, to provide a means of correcting the unpracticable features of the allotment system, and of doing it with a minimum of dislocation and without disturbance of vested rights. And then it adds on a land-acquisition program at the rate of $2,000,000 a year.

Senate Hearings, *supra* at 61.

A similar understanding of the effect of section 5 is apparent in the House hearings on the bill. The following exchange between a member of the House Committee, Representative Peavey, and a Tribal representative typifies that understanding:

> Mr. Peavey: I would have to ask the chief with regard to the objection just stated. As I understand it, he feels that the landless Indians, being in a larger number within the Tribe than those who now own land and property, would therefore outvote them, the land-owning members. I would like to ask him if he knows of the provision in the bill under which it is proposed to reinvest these landless Indians with land by Government purchase, and if that does not meet his objection.
>
> Mr. Saluskin: In reply to that question, I would say this, that if the Government was to buy land for this landless Indian that has already sold his own allotment, what assurance has the Government got that this Indian is going to make use of that land after it is purchased for him?
>
> The Chairman: Does he have objection to the Government buying lands for the landless Indians?
>
> Mr. Saluskin: I have no objections to the Government buying this land for the landless Indians, but I do not want him coming into what I am holding and try to take away from me just in order to accommodate the landless Indians.

Hearings Before the House Committee on Indian Affairs, Part VI, 73d Cong., 2d Sess. 235 (1934).

The court below dismissed the import of this legislative history, seemingly without any in-depth examination, by stating that:

> [W]hile the Senate Report does refer to "landless Indians", the Supreme Court has refused to read such remarks in the legislative history of a similar statute, which also granted tax-exempt status to Indian land, as limiting the benefits of the statute to landless Indians. *Board of Commissioners* v. *Seber,* 318 U.S. 705, 710 (1943).

App. A at . However, the court's reliance on *Seber* is misplaced because the statute involved in that

case, 49 Stat. 1542, as amended, 50 Stat. 188, 25 U.S.C. § 412a, is crucially dissimilar in purpose and content from the statute at issue in the present case.[4]

The Court in *Seber* concluded that the tax exemption granted by the statute did not apply only to lands purchased for landless Indians. The Court reached this conclusion through consideration of the legislative history, statutory language and purpose, contemporary administrative interpretations, and subsequent Congressional history. *Board of Commissioners* v. *Seber, supra* at 710-711. It appears that the sole support for the argument that the statutory tax exemption extended only to lands bought for landless Indians was a single remark made in floor debate by the bill's sponsor. *Board of Commissioners* v. *Seber, supra* at 710, n. 7. However, the language, administrative interpretation and subsequent legislative history of the statute supported the contrary conclusion that the statute was intended to grant a blanket tax immunity to all Indian land within its definition, that is, all homestead lands purchased out of trust funds and subject to restrictions against alienation or encumbrance. *Board of Commissioners* v. *Seber, supra* at 711, n. 8-10.

The *Seber* case is thus easily distinguishable from the present case, where the clear wording of the statute,[5] its legislative history, and contemporaneous ad-

[4] For example, the most obvious distinction between the two statutes is that § 412a does not provide a mechanism for acquisition of land, but merely extends tax-exempt status to Indian homestead lands which were purchased with trust or restricted funds and were held subject to restrictions against alienation or encumbrance. *See* H.R. Rep. No. 562, 75th Cong., 1st Sess. (1937).

[5] The crucial language of 25 U.S.C. § 465—acquisition "for the purpose of providing land for Indians"—is absent from 25 U.S.C. § 412a.

ministrative interpretation,[6] all support the conclusion that § 465 was intended solely to create a mechanism for providing lands for landless Indians. Reliance on *Seber* thus provides no support for the conclusion reached by the court below in the present case.

In support of its conclusion, the court below cites *Board of Commissioners of Pawnee County, Oklahoma* v. *United States,* 139 F.2d 248 (10th Cir. 1943). Like *Seber, supra,* the statute involved in that case is distinguishable from § 465, and the holding in *Pawnee County* is thus inapposite to the present case.

The statute at issue in *Pawnee County* was the Oklahoma Indian Welfare Act of June 26, 1936, 49 Stat. 1967, 25 U.S.C. § 501 *et seq.* A challenge was made to the validity of a taking in trust under that statute, the plaintiffs asserting that the Secretary of the Interior had exceeded his statutory authority by accepting land in trust for the sole purpose of placing tax immunity on the land. The Tenth Circuit held the Secretary's action valid because "both the purpose and result [of the taking] are within the legislative design." *Board of Commissioners of Pawnee County, Oklahoma* v. *United States, supra* at 252.

Significantly, the Oklahoma Act, although it mirrors the language of § 465 in other respects, does not contain the qualifying clause "providing land for Indians", an indication that its purposes are indeed dif-

[6] The contemporaneous administrative interpretation of § 465 was that it would neither be consistent with the purpose of § 465—specifically, "providing land for Indians"—nor within the authority conferred by the Act for the Secretary of the Interior to accept in trust land already owned in fee by an individual Indian. *See* Memoranda from the Solicitor of the United States Department of the Interior to the Commissioner of the Bureau of Indian Affairs (Dec. 18, 1934; April 14, 1935; June 16, 1945), Apps. D, E, F.

ferent than those underlying § 465. Although the court did not expressly articulate those statutory purposes in *Pawnee County,* the House Committee Report on the Act indicates that the purpose behind section 1 was the acquisition of good quality farm lands, a purpose necessarily narrower than that behind 25 U.S.C. § 465. *See* H.R. Rep. No. 2048, 74th Cong. 2d Sess. 3 (1936). The acceptance in trust in *Pawnee County* thus easily falls within the scope of the Oklahoma Act because the statutory test—acquisition of land suitable for agriculture—was met. *Board of Commissioners of Pawnee County, Oklahoma* v. *United States, supra* at 252. The Report further indicates that only sections 3-5 of the Oklahoma Act, providing for tribal organization, were viewed as mirroring parallel provisions of the Indian Reorganization Act. H.R. Rep. No. 2048, *supra* at 3. By implication, therefore, section 1 was not viewed as an identical application of the terms of § 465, the land acquisition provision in the Indian Reorganization Act, to the Oklahoma Indians.

The scope of statutory authority of the Oklahoma Act, as defined by legislative intent, is thus distinct from the purpose and scope of § 465. The court in *Pawnee County* was therefore correct in holding the Secretary's actions valid, because they were within the scope of authority granted him and comported with the legislative intent behind the statute. Clearly this holding cannot be extended to the present case, however, because the purpose of § 465—providing land for landless Indians—is not served by accepting land in trust solely to place a tax exemption on the land.

The court in *Pawnee County* further stated that the fact that the Secretary's initial motivation for the

acceptance in trust was an improper one was irrelevant to a determination of the validity of his actions because the eventual result of the taking was consistent with the statutory purpose, that is, acquisition of land suitable for agricultural use. *Board of Commissioners of Pawnee County, Oklahoma* v. *United States, supra* at 252. This reasoning is likewise inapplicable to the present case because the result of the acceptance in trust falls outside the statutory purpose of providing land for Indians.

IV. The Eighth Circuit held that respondent's allegation of a denial of rights conferred by § 465 stated a cause of action under 42 U.S.C. § 1983. App. A at 8a. Petitioners contend, however, that the court below erred in finding respondent's claim actionable under § 1983 because, first, that section creates a cause of action only for deprivations of constitutional rights; and, second, even if statutory rights are considered within the purview of § 1983, that section covers only those federal statutes enacted to enforce rights secured by the Fourteenth Amendment.

This Court itself has recognized that the question of the scope of § 1983 is unsettled, and on numerous occasions has reserved decision on it. *See Hagans* v. *Lavine,* 415 U.S. 528, 533, n. 5 (1974); *King* v. *Smith,* 392 U.S. 309, 312, n. 3 (1968). Similarly, there is a disagreement among the lower federal courts on the issue. *Compare Wynn* v. *Indiana State Department of Public Welfare,* 316 F. Supp. 324 (N.D. Ind. 1970) *with Blue* v. *Craig,* 505 F.2d 830 (4th Cir. 1974).

Originally enacted as section 1 of the Civil Rights Act of April 20, 1871, 17 Stat. 133, the predecessor of 42 U.S.C. § 1983 provided as follows:

> That any person who under color of law, statute, ordinance, regulation, custom, or usage, of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities *secured by the Constitution* of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled 'An Act to protect all persons in the United States in their Civil rights, and to furnish the means of their vindication'; and the other remedial laws of the United States which are in their nature applicable in such cases. (Emphasis added.)

In 1874, the statute was included as § 1979 in the Revised Statutes, and appeared there in a form identical to the present § 1983.

For purposes of this case, the most significant difference between the original and revised versions of what is now § 1983 is the addition of the phrase "and laws" to § 1979 in the Revised Statutes. Petitioners contend that this addition, accomplished through revision alone and not pursuant to a clear expression of Congressional intent to alter the meaning of the statute, should not be accorded controlling weight to

alter the substance of the original Act by including causes of action based solely on denial of federal statutory rights. Instead, the text of the original act must be recognized as controlling, and, therefore, § 1983 should be interpreted to create a cause of action only for constitutional, not statutory, rights.

Petitioners' position is supported by *Wynn* v. *Indiana State Department of Welfare, supra,* in which the court concluded that

> [t]he intention of Congress in enacting the Civil Rights Act of 1871 must be determined from the *language of the original statute,* its legislative history and subsequent judicial interpretations. (Emphasis in original.)

Id. at 328. Consonant with this interpretation, the court in *Wynn* held that an alleged deprivation of rights secured by the Social Security Act, due to an inconsistent state statute, was not actionable under § 1983.

The court's conclusion in *Wynn* is well-supported by numerous judicial statements reiterating the general principle of statutory construction that no inference of a substantive change is accorded changes in language resulting from statutory revision, unless Congressional intent to accomplish such change is clearly expressed. *See Anderson* v. *Pacific Coast S.S. Co.,* 225 U.S. 189, 199 (1912) (". . . it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed."); *United States* v. *Ryder,* 110 U.S. 729, 740 (1884); *United States* v. *Thompson,* 319 F.2d 665, 669 (2d Cir. 1963); *cf. Fourco Glass Co.* v. *Transmirra Products Corp.,* 353 U.S. 222, 227 (1957).

Clearly such a major change in meaning to § 1983 should not be attributed to an addition to the statutory language that was not even commented upon by the draftsmen of the revision, and did not follow from any express Congressional directive to effect a substantive change. *See* Note, *Federal Jurisdiction over Challenges to State Welfare Claims,* 72 Col. L. Rev. 1408, 1418 (1972). The lack of commentary by the revisers is made more significant by the fact that the statute authorizing the Revision required the draftsmen to "suggest to Congress such contradictions, omissions, and imperfections as may appear in the original text, with the mode in which they have reconciled, supplied, and amended the same." Act of June 27, 1866, § 3, 14 Stat. 74. Further, this Court in dicta has indicated its own belief that the 1874 Revision accomplished no significant substantive change in the original 1871 Act. *See Adickes* v. *S. H. Kress and Co.,* 398 U.S. 144, 203, n. 15 (1970); *Monroe* v. *Pape,* 365 U.S. 167, 212-213, n. 18 (1961) (opinion of Frankfurter, J.); *cf. Hague* v. *C.I.O.,* 307 U.S. 496, 510 (1939).

Examination of the legislative history itself confirms the proposition that the enacting Congress interpreted the predecessor to § 1983 as a mechanism for federal enforcement of constitutionally protected rights, or more specifically, those rights conferred by the Fourteenth Amendment and, in particular, the equal protection clause. The legislative history is replete with references to the general purpose of the bill, which both proponents and opponents agreed was to enforce constitutionally guaranteed rights. For example, Representative Williams stated:

> Mr. Speaker, this bill that meets with the united opposition of these degenerate sons of the old Democratic fathers provides—what? Only for the enforcement of the three great rights of the Declaration of Independence . . . . For it I can cheerfully vote, or for the enactment of any law which shall secure to every American citizen the equal protection of the law and the enforcement of every constitutional privilege by appropriate legislation.

Cong. Globe, 42d Cong., 1st Sess., App., at 165 (1871) (hereinafter "Globe App."). Representative Dawes echoed the same theme:

> The rights, privileges, and immunities of the American citizen, secured to him under the Constitution of the United States, are the subject matter of this bill . . . . The purpose of this bill is, if possible, and if necessary, to render the American citizen more safe in the enjoyment of those rights, privileges, and immunities.

Cong. Globe, 42d Cong., 1st Sess., at 475 (1871) (hereinafter "Globe"). Senator Thurman, an opponent of the bill, nevertheless concurred in its supporters' interpretation:

> [The bill] authorizes any person who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States, to bring an action against the wrong-doer in the Federal courts . . . . I am certainly not in favor of denying to any man who is deprived unlawfully of his right, his privilege, or his immunity, under the Constitution of the United States that redress to which every man is entitled whose rights are violated; but I do think that it is a most impolitic provision, that in effect may transfer the hearing of all such causes into the Federal courts.

Globe App. at 216.

In addition, one focus of the legislative debate was the source of Congress' constitutional power to enact the bill, and it was in that context that the correlation between the Fourteenth Amendment and the bill was recognized; that is, the bill's supporters contended that section 5 of the Fourteenth Amendment conferred authority on Congress to enact § 1983 as appropriate legislation to enforce the provisions of the Amendment. In this regard, Representative Elliot stated:

> I shall not reiterate the argument already so exhaustively applied, as derived from the fourteenth amendment, which this bill is declaredly designed to enforce. I would only call attention to section five of that article, which declares:
>
> > "The Congress shall have power to enforce by appropriate legislation the provisions of this article."
>
> Is not this bill "appropriate legislation"? I apprehend, Mr. Speaker, that it is obnoxious to the Democratic party chiefly because it is "appropriate", and strikes at the homicidal proclivities which have become chronic among the active allies of that party . . . .

Globe at 390. Representative Mecur viewed the issue in a similar light:

> . . . the last clause of the amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." How is that to be enforced?
>
> * * *
>
> You will observe, Mr. Speaker, the great object to be accomplished, the great end to be reached, is "protection" . . . .

> How then is this constitutional requirement to be enforced? The fifth section of the fourteenth amendment answers the question . . . .
>
> There is the power, and the bill now under consideration contains the "appropriate legislation."

Globe App. at 182.

The legislative history thus makes abundantly clear that Congress intended the predecessor to § 1983 to serve as a means of redress of constitutionally protected rights. Its use in enforcing purely statutory rights seems not to have been within the contemplation of Congress, and it would therefore be contrary to Congressional intent to expand the scope of § 1983, as the court below did, to include purely statutorily-based claims.

Explicit discussion of the definitional scope of § 1983 in this regard is noticeably absent from the case law, but the omission can best be attributed to the fact that virtually all suits brought under § 1983 present allegations of strictly constitutional, not statutory, deprivations. It is significant, however, that this Court has given indications that § 1983 is limited to constitutional claims. *E.g., Wood* v. *Strickland,* 420 U.S. 308, 326 (1975) ("... § 1983 was not intended to be a vehicle for federal-court corrections of errors . . . which do not rise to the level of violations of specific constitutional guarantees."); *cf. Monell* v. *Department of Social Services of the City of New York,* 98 S. Ct. 2018 (1978). *See also Monell* v. *Department of Social Services of the City of New York, supra* at 2049, n. 1 (Rehnquist, J., dissenting). In addition, various federal courts have similarly indicated that only constitutional rights are actionable under § 1983. *Gearheart* v. *Federal Reserve*

Bank of Cleveland, 516 F.2d 353, 354 (6th Cir. 1975), *cert. denied,* 423 U.S. 937 (1975) ("A necessary element of a civil rights claim pursuant to 42 U.S.C. §§ 1983 and 1985 is the violation of a constitutional right."); *Jones* v. *Bombeck,* 375 F.2d 737, 738 (3d Cir. 1967) ("To state a cause of action under the Civil Rights Act, it is necessary that there be an allegation that plaintiff was denied or that there was a conspiracy to deny him a constitutional right, privilege or immunity."); *Brown* v. *Brown,* 368 F.2d 992, 993 (9th Cir. 1966) ("The Federal Civil Rights Act creates a cause of action to remedy deprivations of Constitutional rights . . . .").

In support of the opposite conclusion, the court below relied principally on *dicta* in *Greenwood* v. *Peacock,* 384 U.S. 808, 829-830 (1966), together with various lower court cases recognizing a statutorily-based cause of action under § 1983. App. A at 7a. All those cases are fundamentally unpersuasive, however, because they involved either constitutional rights codified in statutory form, or the use of flawed reasoning by the courts themselves.

Reliance by the Eighth Circuit on *Greenwood* was particularly inappropriate because the significant statement regarding § 1983 was no more than one of a series of suggestions by the Court of alternative remedies available to the petitioners in that case. As was recognized by the court in *Wynn* v. *Indiana Department of Public Welfare, supra* at 331, that statement "must be interpreted with great reservation," and can in no way be regarded as affirmative recognition of the Eighth Circuit's conclusion by this Court.

The other cases relied on by the court below are similarly unpersuasive. The court in *Sanders* v. *Conine,*

506 F.2d 530 (10th Cir. 1974), found a § 1983 cause of action for deprivation of rights under 18 U.S.C. § 3182, a statute effectuating the specific provisions regarding extradition contained in Art. IV, § 2 of the Constitution. The direct constitutional derivation of the claim in that case is thus readily apparent. Further, both *Blue* v. *Craig,* 505 F.2d 830 (4th Cir. 1974) and *Gomez* v. *Florida State Employment Service,* 417 F.2d 569 (5th Cir. 1969), merely cite the language of § 1983 and rely on the *dicta* in *Greenwood* to support finding a cause of action for statutorily derived rights. Both *Blue* and *Gomez* thus suffer from the same infirmities as the opinion of the court below. The remaining case, *Bomar* v. *Keyes,* 162 F.2d 136 (2d Cir. 1947), should likewise not be accorded great weight, since its reasoning and conclusion are questionable, given that the court assumed, without analysis, both that § 1983 created a cause for action for statutory rights, and conferred jurisdiction over the claim as well.

Since § 1983 as originally enacted was intended by Congress to create a federal cause of action only for constitutional claims, respondent's claim in the present case clearly was not actionable under § 1983. Her equal protection claim, based on alleged racial discrimination, was rejected by the district court below, App. B at 18a, and recognized as without merits by the Eighth Circuit itself. App. A at 12a. Respondent's only claim on appeal was that her rights under § 465 had been denied by petitioners, and thus no claim of constitutional deprivation was at issue.

However, in a rather obfuscated attempt to inject constitutional overtones into respondent's claim, the Eighth Circuit stated that

> [h]ere a federal right was conferred upon a tribal Indian and the challenged local action allegedly interfered with that right, and, therefore, with the relationship between the federal government and a tribal Indian. Thus, the constitutional dimension of the claim is particularly evident. Congress has the plenary and exclusive power to deal with Indian tribes, *Bryan* v. *Itasca County, supra* at 376, n. 2, a power derived from federal responsibility for treaty-making, U.S. CONST. art. 1, § 8, cl. 3 [*sic*], and from the commerce clause, U.S. CONST. art. 2, § 2, cl. 2 [*sic*].

App. A at 8a. Assuming that the court below was implying that the federal "guardian-ward" relationship with Indians is itself of constitutional proportions, it is difficult to understand how that transforms respondent's statutory claim into a constitutional one, since, as the court itself recognized, App. A at 8a, Congress' assumption of the guardian role was voluntary, and not one imposed upon the federal government, nor conferred on individual Indians, by the Constitution itself. Therefore, respondent could in no way be said to be asserting a constitutional claim cognizable under § 1983.

Another implication to be drawn from the Eighth Circuit decision is that the Supremacy Clause provides the "constitutional dimension" necessary to state a claim under § 1983, since the essence of respondent's claim was that state action interfered with a federal right and thus was invalid under the Supremacy Clause. This argument was similarly reserved for future decision by this Court in *Hagans* v. *Lavine, supra.*

The Second Circuit has aptly addressed, and rejected, a similar argument in the context of the jurisdictional counterpart to § 1983, 28 U.S.C. § 1343(3). *Andrews* v. *Maher,* 525 F.2d 113 (2d Cir. 1975). The court in *Andrews* stated:

> The Supremacy Clause does not secure rights to individuals; it states a fundamental structural principle of federalism. While that clause is the reason why a state law that conflicts with a federal statute is invalid, it is the federal statute that confers whatever rights the individual is seeking to vindicate.

Id. at 119. Clearly, then, respondent's claim cannot be converted, through "verbal legerdemain", *Id.,* into a claim of constitutional dimension by invocation of the Supremacy Clause. *Accord, Gonzalez* v. *Young,* 560 F.2d 160 (3d Cir. 1977), *cert. granted,* 98 S. Ct. 1232 (1978).

Finally, even if deprivation of statutory rights is considered to constitute a cause of action under § 1983, that interpretation must be limited to rights created by only those statutes directed toward enforcing rights secured by the Fourteenth Amendment. *See Hackin* v. *Lockwood,* 361 F.2d 499, 500 (9th Cir. 1966) ("The purpose of [§ 1983] is to enforce the Fourteenth Amendment to the Constitution."); *Wynn* v. *Indiana State Department of Public Welfare, supra,* and cases cited therein.

This Court has clearly, if implicitly, recognized the intimate correlation between § 1983 and the Fourteenth Amendment, and Congress' intention that § 1983 function as the enforcement mechanism for deprivations of rights secured by the Fourteenth Amendment. *See Monroe* v. *Pape,* 365 U.S. 167 (1961); *cf. Monell* v.

Department of Social Services of the City of New York, supra. Indeed, as the initial premise of its exhaustive examination of the legislative history of § 1983 in *Monroe*, the Court stated that § 1983

> was one of the means whereby Congress exercised the power vested in it by § 5 of the Fourteenth Amendment to enforce the provisions of that Amendment . . . . Its purpose is plain from the title of the legislation, "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes."

Monroe v. *Pape, supra* at 171. The Court then concluded that the petitioner's allegations in that case were within the scope of § 1983, since the guarantee against unreasonable searches and seizures had been incorporated and made applicable to the states through the due process clause of the Fourteenth Amendment. *Id.*

As was recognized by the district court in the present case, App. B at 18a, even under this alternate interpretation of § 1983 respondent would likewise be barred from asserting her claim under § 1983, because the basis of her claim, § 465, is not a statute directed toward protection of Fourteenth Amendment rights.

V. The court below found that respondent's claim that she had been denied rights under 25 U.S.C. § 465 presented a cause of action under 42 U.S.C. § 1983. App. A at 8a. The court then proceeded to determine whether petitioners' conduct was precluded by the Supremacy Clause, U. S. CONST. art. VI, cl. 2, because it impaired respondent's enjoyment of the beneficial use of her trust land. App. A at 11a. However, a pre-emption analysis was clearly inappropriate in relation to the facts of this case.

The issue to be examined in this case was simply whether petitioners could deny respondent access to certain municipal services while providing such services to residents of fee land within its jurisdiction. An examination of this issue in an equal protection context was required. The lower court, however, recognizing the district court's finding that there was a rational basis for the classification, App. B at 22a, and that such classification was not racially motivated, App. A at 18a, chose to analyze the denial of services in a pre-emption framework. Under this framework, "state and local law may be applied to reservation Indians and their property unless (1) it frustrates or interferes with tribal self-government, or (2) it impairs a right granted or reserved by federal law. . . ." App. A at 9a. Petitioners were found to have impaired a right guaranteed respondent under federal law, and this impairment or interference was said to be "precluded by the Supremacy Clause." App. A at 11a.

The respondent had received her trust land and was free from paying taxes for such land. Petitioners, in an attempt to protect the interests of the City of New Town, refused to connect the City's water and sewer lines to the home of respondent. It was this denial of services which is said by the lower court to be preempted by federal law. Neither in the field of Indian law, nor in other pre-emption cases, has the pre-emption doctrine been utilized in an analogous factual setting. In fact, this Court has consistently employed a pre-emption analysis only where the validity of a state *statute* or *regulation* was at issue. *Jones* v. *Rath Packing Co.*, 430 U.S. 519 (1977) (validity of California statute and regulation pertaining to labeling by

weight of packaged foods); *Perez* v. *Campbell,* 402 U.S. 637 (1971) (whether section of Arizona Motor Vehicle Safety Responsibility Act was invalid under Supremacy Clause as conflicting with § 17 of the Bankruptcy Act, 11 U.S.C. § 35); *Florida Lime and Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132 (1962) (whether California Agricultural Code regulating transportation or sale of avocados was pre-empted by federal marketing orders issued pursuant to the Agricultural Adjustment Act); *Cloverleaf Butter Co.* v. *Patterson,* 315 U.S. 148 (1942) (validity of Alabama statute regulating commerce in renovated butter); *Hines* v. *Davidowitz,* 312 U.S. 52 (1941) (validity of Pennsylvania Alien Registration Act). Even in the field of Indian law, a pre-emption analysis has been used only where affirmative conduct by the State, derived from state statutory enactments, had allegedly interfered with tribal self-government, or rights granted or reserved pursuant to federal law. *E.g., Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145, 148 (1973). These cases, which include those cited by the court below, App. A at 9a, all involved a pre-emption analysis as applied to affirmative assertions of state authority. *Moe* v. *Confederated Salish and Kootenai Tribes,* 425 U.S. 463 (1976) (imposition of state personal property tax, vendor license fee, and cigarette sales tax); *Mescalero Apache Tribe* v. *Jones, supra* (imposition of state use and gross receipts taxes on off-reservation tribal ski resort); *McClanahan* v. *State Tax Commission of Arizona,* 411 U.S. 164 (1973) (imposition of state tax on personal income exclusively derived from reservation sources).

It is state and local regulation or other affirmative conduct, through which the state and local governments attempt to assert their jurisdiction in an area regulated by federal law, which is pre-empted. Here, petitioners have merely drawn the line between those who are to receive municipal services and those who should not. Thus, a pre-emption analysis was unwarranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS M. BEYER
17 Second Avenue West
Dickinson, North Dakota 58601

September, 1978

Appendix

APPENDIX A

OPINION

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH DISTRICT

No. 77-1317

BEULAH CHASE, *Appellant*,

v.

ROLAND MCMASTERS, JACK SMITH, JR., WAYNE TURNER, ARLYN WADHOLM and RUSSEL PEDERSON, *Appellees*.

Appeal from the United States District Court for the District of North Dakota

Submitted: November 16, 1977
Filed: April 5, 1978

Before HEANEY, WEBSTER* and HENLEY, Circuit Judges.

HEANEY, Circuit Judge.

Beulah Chase is an enrolled member of the Three Affiliated Indian Tribes which occupy the Fort Berthold Reservation in North Dakota. She brought this action for declaratory, injunctive and monetary relief pursuant to 42 U.S.C. § 1983 and § 1985(3) against the mayor and councilmen of New Town, North Dakota, individually and in their official capacities. She alleged that their refusal to allow her to connect her home to city sewer and water lines violated her right to equal protection of the laws and deprived her of a statutory right to have her land, which

* WILLIAM H. WEBSTER, Circuit Judge, participated in the oral argument and bench conference but did not participate in the preparation of this opinion.

was held in trust for her by the United States, exempt from local taxes. The Indian Organization Act of 1934, also known as the Wheeler-Howard Act, 25 U.S.C. § 461 *et seq.* (1970), authorizes the Secretary of the Interior to acquire land for Indians. Under 25 U.S.C. § 465, title to such lands is taken by the United States in trust for the Indian or Indian tribe, and the land is exempt from state and local taxation.[1]

The District Court initially dismissed the § 1985(3) claim and denied preliminary injunctive relief. *Chase v. McMasters,* 405 F.Supp. 1297 (D N.D. 1975). It subsequently denied relief on the § 1983 claim after it considered exhibits, depositions and stipulations of fact. Chase appeals from the latter judgment.

BACKGROUND

New Town is within the Fort Berthold Reservation. *The City of New Town, North Dakota v. United States,* 454

[1] Section 465 reads as follows:

> The Secretary of the Interior is hereby authorized in his discretion, to acquire through purchase, relinquieshment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians.
>
> • • • •
>
> Title to any lands or rights acquired pursuant to this Act [25 U.S.C. §§ 461-463, 464, 465, 466-470, 471-473, 474, 475, 476-478, 479] shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

25 U.S.C. § 465 (1970).

The Three Affiliated Tribes voted to have the Indian Reorganization Act apply to them, *see* 25 U.S.C. § 478, and have adopted a Constitution and By-Laws under § 476 of the Act.

F.2d 121 (8th Cir. 1972). Chase and her husband, John, purchased a parcel of land located within the city limits from New Town in 1974. Approximately a year late, the Chases conveyed title to the lot to the United States in trust for Beulah Chase. The acquisition, made pursuant to § 465, was approved by the Department of the Interior, Bureau of Indian Affairs. Shortly thereafter, the Chases applied to the city council for connection to city sewer and water lines which ran across the front of their lot. Seven hundred and two dollars ($702.00) of the $1,102.00 purchase price of the lot was payment of special assessment charges for construction of the water and sewer lines and a water treatment plant, and the Chases were willing to pay the routine connection fee and subsequent service charges. The city council, aware of the land's trust status, delayed action on the request until it could obtain legal advice as to whether it was required to provide sewer and water services to a lot held in trust by the United States for an individual. The chief of police, following what he believed to be the mayor's instructions, informed John Chase that New Town would not allow the water hookup as long as the lot was in trust status, and Beulah Chase filed suit.

In an unpublished opinion, the District Court held that Chase failed to present a prima facie case of racial bias and had not been denied any constitutional rights by New Town's actions. It held that the action was reasonable and justified because New Town would not be able to assess Chase's land in order to collect delinquent sewer service charges as it is able to assess other lands. *See* N.D. CENT. CODE § 40-34-05 (1960).

MOOTNESS

Chase's claim for injunction relief became moot when she sold the property in question. She did not, however,

abandon her claim for damages.[2] A viable claim for damages insures the existence of a live controversy appropriate for judicial resolution—at least to the extent of determining whether a claim is stated and a damage remedy is available. *See Powell v. McCormack,* 395 U.S. 486, 495-500 (1969): 13 C. Wright, A. Miller and E. Cooper, Federal Practice and Procedure § 3533 at 272-273 (1972). Thus, this case can be distinguished from *Ashcroft v. Mattis,* 431 U.S. 171 (1977), which held that no live controversy was present because the plaintiff had previously abandoned his claim by not appealing the decision that the defendants were immune from liability in damages.

CONSTRUCTION OF 25 U.S.C. § 465

New Town argues that § 465 does not authorize the Secretary of the Interior to accept conveyance of title to land already owned in fee by an individual Indian. We disagree.[3] Although the term "acquisition" and the stated purpose of "providing land for Indians" could indicate that the Secretary was only authorized to make a net addition to existing Indian land holdings by providing lands for landless Indians, such an interpretation is not required by the statutory language or the Act's legislative history. While the Senate Report does refer to "landless Indians,"

[2] The complaint states a viable claim for damages under the liberal pleading provisions of Fed.R.Civ.P. 8. Chase requested damages for the diminished value of her land; inability to receive, or difficulty in receiving, a federal housing loan; and for being deprived of water and sewer service while living on her land in a mobile home.

[3] Although the Department of the Interior is not a party and New Town did not pursue administrative remedies, we do not hesitate to decide this issue. Its resolution is necessary to determination of the defendants' liability, the facts are not in dispute, and the issue is one of statutory construction which does not require administrative expertise or involve exercise of administrative discretion. *See Mescalero Apache Tribe v. Hickel,* 432 F.2d 956, 958 (10th Cir. 1970), *cert. denied,* 401 U.S. 981 (1971).

the Supreme Court has refused to read such remarks in the legislative history of a similar statute, which also granted tax-exempt status to Indian land, as limiting the benefits of the statute to landless Indians. *Board of Comm'rs v. Seber,* 318 U.S. 705, 710 (1943). A narrow construction of the term "acquire" and the phrase "providing land for Indians" runs counter to the principle that ambiguous statutes passed for the benefit of Indian tribes are to be interpreted in a light most favorable to Indians. *Bryan v. Itasca County,* 426 U.S. 373, 392 (1976), *quoting Alaska Pacific Fisheries v. United States,* 248 U.S. 78, 89 (1918).

The purpose of the Indian Reorganization Act of 1934 was "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 152 (1973), *quoting* H. R. Rep. No. 1804, 73rd Cong. 2d Sess., 1 (1934). The Act reflected a new federal policy of halting the loss of Indian lands which had occurred under statutes that allotted tribal lands to individual Indians and disposed of "surplus" lands under settlement laws. *Id.* at 151. The Act not only authorized the Secretary to acquire land for Indians, 25 U.S.C. § 465, but continued the trust status of restricted lands indefinitely, 25 U.S.C. § 462, restored unallotted "surplus" lands to tribal sovereignty, 25 U.S.C. § 463, and made voluntary exchanges and transfers of land to tribes exempt from the prohibition against transfers of restricted Indian land. 25 U.S.C. § 464. Because many Indians who were unable to manage their allotted lands had sold them or had them sold at a tax sale, *see* 78 Cong. Rec. 11726 (1934) (remarks of Rep. Howard), immunity from property taxes was an important means of halting further loss of Indian land. *See* generally U. S. Dept. of the Interior, Federal Indian Law 857 (1958). Thus, even if, as the defendants contend, the Secretary did take Chase's desire to be relieved from the obligation of paying prop-

erty taxes into account in making his decision, he would not necessarily have exceeded his delegated authority. *See Board of Comm'rs of Pawnee County, Okla. v. United States,* 139 F.2d 248, 252 (10th Cir. 1943).

The Secretary may purchase land for an individual Indian and hold title to it in trust for him. There is no prohibition against accomplishing the same result indirectly by conveyance of land already owned by an Indian to the United States in trust. Section 465 lists gifts among the means by which the Secretary may acquire land, and it was amended to authorize acquisition of land in trust for individual Indians as well as for tribes. *See* 78 CONG. REC. 11126 (1934). Congress did not limit the Secretary's discretion to select land for acquisition. The land acquired may be located within or without a reservation, and there is no indication that it would not be located within municipal boundaries. Indeed, in legislation passed in 1937, Congress provided that Indian homestead lands located within villages, town or city boundaries would be tax exempt. *See* 25 U.S.C. § 412(a).

We conclude that § 465 authorizes the type of acquisition the Secretary made here. The defendants argue, however, that the Secretary abused his discretion in this particular case. Since the Secretary's action was not directly challenged, we do not have the benefit of a record of agency proceedings and do not know what factors the Secretary took into account in exercising his discretion. Suffice it to say, however, that the defendants have not demonstrated improper agency action. Given the purposes of the Act, the mere fact that Chase was motivated by a desire to avoid paying taxes does not indicate that the Secretary abused his discretion by acceptance of the conveyance.[4]

[4] The Bureau of Indian Affairs' guidelines on placing title to land acquired by an individual Indian in trust with the United States do not set forth specific objective criteria and are not published in the Code of Federal Regulations. However, the Bureau's current policy appears to be consistent with our holding. Where there is statutory authority, the Bureau's policy is to allow individual Indians who acquire land to convey title to the land to the United States in trust for them, unless the trust status of the land is being abused. 54 IAM 2.2.1F, Release 54-4, June 27, 1960, as modified by Commissioner's memorandum of August 3, 1960 (4346-59-317).

See Board of Comm'rs of Pawnee County, Okla. v. United States, supra.

STATEMENT OF A CLAIM UNDER 42 U.S.C. § 1983

Chase claims that New Town's action deprived her of her right to the beneficial use of property exempt from taxation under § 465. The District Court held that she did not state a cause of action under 42 U.S.C. § 1983 by alleging a violation of § 465 because § 1983 only creates a cause of action for redress of violations of rights secured by the Fourteenth Amendment to the United States Constitution or a federal statute enacted to enforce the Fourteenth Amendment. *Chase v. McMasters, supra* at 1300. It erred in so holding.

Section 1983 creates a cause of action "not only for violations of rights conferred by federal equal civil rights laws, but for violations of other federal constitutional and statutory rights as well." *Greenwood v. Peacock,* 384 U.S. 808, 829-830 (1966). *See, e.g., Sanders v. Conine,* 506 F.2d 530 (10th Cir. 1974) (extradition, 18 U.S.C. § 3182 (1970)); *Blue v. Craig,* 505 F.2d 830 (4th Cir. 1974) (Social Security Act, 12 U.S.C. § 1396(A) (1970)); *Gomez v. Florida State Employment Service,* 417 F.2d 569 (5th Cir. 1969) (Wagner-Peyser Act, 29 U.S.C. § 49 *et seq.* (1970)); *Bomar v. Keyes,* 162 F.2d 136 (2d Cir.), *cert. denied,* 332 U.S. 825 (1947) (Judiciary Act, 28 U.S.C. § 411 (1940)). *See also* the discussion in *Lynch v. Household Finance Corp.,* 405 U.S. 538, 543 n.7 (1972). While subsequent cases have made it clear that a § 1983 action does not exist for

every violation of a federal statute,[5] we think it clear that the violation here, based as it is upon the "unique legal relationship between the Federal Government and tribal Indians," *Morton v. Mancari*, 417 U.S. 535, 550 (1974), does state a cause of action under § 1983. Here a federal right was conferred upon a tribal Indian and the challenged local action allegedly interfered with that right and, therefore, with the relationship between the federal government and a tribal Indian. Thus, the constitutional dimension of the claim is particularly evident. Congress has the plenary and exclusive power to deal with Indian tribes, *Bryan v. Itasca County, supra* at 376 n. 2, a power derived from federal responsibility for treaty making, U.S. CONST. art. 1, § 8, cl. 3, and from the commerce clause, U.S. CONST. art. 2, § 2, cl. 2. *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 172 n.7 (1973). The federal government assumed a "guardian-ward" relationship with the tribal Indians, *Morton v. Mancari, supra* at 551, and has the power to fulfill its trust obligations by protecting the Indians and their property from state interference. *Bryan v. Itasca County, supra, quoting Board of Comm'rs v. Seber*, 318 U.S. 705, 715 (1943). Thus, the federal forum is appropriate for a claim of state or local interference with a right conferred on tribal Indians by federal law.

We hold, therefore, that Chase's claim that she was denied rights under 25 U.S.C. § 465 states a claim under 42 U.S.C. § 1983. We look now to the merits of her claim.

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[5] Not every civil right is a right derived or secured by the Constitution or laws of the United States for purposes of § 1983. In *Scheelhaase v. Woodbury Central Community Sch. Dist.*, 488 F.2d 237 (8th Cir.), *cert. denied*, 417 U.S. 969 (1974), this Court held that when federal due process protections were provided, failure to renew a nontenured teacher's contract for reasons of competency and not for an impermissible constitutional reason such as race, or for assertion of constitutionally protected rights, did not state a claim under 42 U.S.C. § 1983.

When state or local actions affecting Indian land are challenged, specific treaties and federal statutes must be examined in the light of the particular actions. *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 481, n.17 (1976); *Mescalero Apache Tribe v. Jones, supra* at 148; *Cass County v. United States*, No. 77-1523, slip op at 9 (8th Cir. February 14, 1978). Section 465 expressly states that title to land acquired under its provisions will be held in trust by the United States for the Indian or Indian tribe, and that the land will be exempt from taxation. Accordingly, any attempt by New Town to tax Chase's land would, of course, be precluded by the Supremacy Clause. U. S. CONST. art. VI, cl. 2. New Town did not attempt to tax the land; it simply refused to connect the land to city water and sewer lines as long as it was held by the United States in trust and was exempt from local property taxes. Outside the special area of taxation,[6] state and local law may be applied to reservation Indians and their property unless (1) it frustrates or interferes with tribal self-government, or (2) it impairs a right granted or reserved by federal law. *Moe v. Salish & Kootenai Tribes, supra* at 483; *Mescalero Apache Tribe v. Jones, supra* at 148; *Organized Village of Kate v. Egan*, 369 U.S. 60, 75 (1962). We hold that New Town's action is precluded by the Supremacy Clause because it impaired Chase's right under § 465 to enjoy the beneficial use of land held in trust for her without the obligation to pay local taxes and thereby inter-

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[6] In recent decisions, the Supreme Court has invalidated attempts by states and localities to tax Indians and their property, utilizing a general preemption doctrine. *See, e.g., Bryan v. Itasca County*, 426 U.S. 373 (1976); *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973). The doctrine of Indian sovereignty is a "back drop" for this doctrine, *McClanahan v. Arizona State Tax Comm'n, supra* at 172, and it is supported by the extensive federal legislative and administrative regulation of Indian tribes and reservations. *Id.* at 173-179.

IMMUNITY FROM DAMAGES

Local executive or administrative officials are accorded a qualified, good faith immunity from liability in damages under 42 U.S.C. § 1983. *See Wood v. Strickland,* 420 U.S. 308, 322 (1975); *Williams v. Anderson,* 562 F.2d 1081, 1101 (8th Cir. 1977); *Curry v. Gillette,* 461 F.2d 1003, 1005 (6th Cir.), *cert. denied,* 409 U.S. 1042 (1972); *Oberhelman v. Schultze,* 371 F.Supp. 1089, 1090 (D. Minn), *aff'd mem.,* 505 F.2d 736 (8th Cir. 1974). Accordingly, the defendants herein are liable only if (1) they knew, or reasonably should have known, that their actions violated Chase's clearly established constitutional rights or (2) they took the action with malicious or impermissible motives of causing a deprivation of constitutional rights or other injury to Chase. *Wood v. Strickland, supra* at 322; *Williams v. Anderson, supra* at 1101.

The right to transfer privately owned lands to the United States in trust has not been previously judicially determined. The guidelines of the Bureau of Indian Affairs are unpublished and its policies are somewhat ambiguous. Thus, we cannot say that the defendants knew or reasonably should have known that their action violated the Supremacy Clause. Moreover, the record does not disclose

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councilmen were primarily concerned over the tax-exempt status of Chase's land rather than her status as an enrolled tribal Indian. While it is true that the impact of their decision would fall disproportionately upon Indians if applied to all lots that the United States holds in trust for individuals, this fact alone does not suffice to show a prima facie case of racial discrimination when the motive for the action is not racial discrimination. *See Arlington Heights v. Metropolitan Housing Corp.,* 429 U.S. 252 (1977); *Confed. Bands & Tribes, Etc. v. State of Wash.,* 552 F.2d 1332, 1334-1335 (9th Cir. 1977), *appeal filed,* 46 U.S.L.W. 3228 (October 4, 1977). Because the record demonstrates that New Town's action was aimed at preserving its fiscal integrity and it was apparently willing to serve Chase if she paid local taxes, its conduct did not violate her right to equal protection of the laws.

any malicious, racially discriminatory or otherwise impermissible motives behind the city council's action. The council members cannot be held liable for failure to predict judicial resolution of the question and are entitled to immunity with respect to Chase's claims.

In conclusion, we have held that Chase stated a cause of action under § 1983 and that New Town's actions were precluded by the Supremacy Clause. We have further held, however, that the appellees are immune from liability for damages. In light of our decision with respect to the appellees' immunity from damages, we do not feel that it is necessary to reach the question of whether a declaratory judgment should issue.

Accordingly, we affirm the District Court's denial of relief to Chase for the reasons stated herein.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

OPINION

BEULAH CHASE, *Plaintiff*,

v.

ROLAND MCMASTERS et al., *Defendants*.

No. A4-75-71

UNITED STATES DISTRICT COURT,
D. NORTH DAKOTA,
NORTHWESTERN DIVISION.

Dec. 20, 1975.

Memorandum and Order

VANSICKLE, District Judge.

This is an action, laid under civil rights theories, for an order of this Court mandating the city government of New Town, North Dakota, to tie sewer and water into an urban lot held by the United States in trust under Title 25 United States Code § 465. The matter is presented on verified pleadings and affidavits on a motion for preliminary injunction.

The motion for preliminary injunction is denied.

Plaintiff is an enrolled Indian of the Three Affiliated Tribes. New Town is a federally sponsored city, laid out within the Fort Berthold Indian Reservation, to replace Spanish and Van Hook, which were inundated by the Garrison Reservoir.

Plaintiff and her husband, after retiring from their employment in California, moved back to New Town. Plaintiff has bought from the City of New Town Lot 16, Block 3, Highland Village Addition. This lot is serviceable by city water and sewer, and in fact $702.00 of the $1,302.00

paid for the lot included special assessments for water mains, sewer mains, and other municipal improvements. Plaintiff undertook to finance construction of her home through the Fort Berthold Housing Authority, which locally administered Housing and Urban Development (HUD) Loans. As a preliminary step, on June 23, 1975, Plaintiff transferred her lot to the United States to be held as Indian trust land pursuant to 25 United States Code § 465. She acted under the assumption that HUD required such a transfer in trust as a condition precedent for the construction of an Indian Mutual Help Unit. HUD has denied by letter (in affidavit attachments) that it imposes any such requirement. However, it does require that a cooperation agreement be executed between the municipality and the local agent of HUD before HUD will authorize the placement of any units on trust or fee land within a municipality. The purpose of the cooperation agreement is to assure that Indian Mutual Help Units are provided municipal services; and the quid pro is a guarantee of payment-in-lieu-of-taxes by HUD.

There is no showing of a good faith effort of HUD or its agent to negotiate such a cooperation agreement. Rationally, HUD, as the unit seeking the privilege, would seem to be the party who should initiate the negotiation.

Plaintiff moved a house trailer onto the lot in May of 1975. She anticipates, when the loan is approved, building a home on the lot. Meantime, if she wishes to live in the mobile home, she must do so without water or sewer. Plaintiff is receiving retirement income, and has professed her willingness to pay for all connection charges of both water and sewer and for the subsequent service charges that flow therefrom.

In the meantime, the City of New Town, cognizant of the trust status of the land, and of the fact it cannot levy special assessments on trust land or recover delinquent service charges from trust land by assessments collectible

in the nature of taxes, as it can in the case of fee land (see N.D.C.C. §§ 40-24-01, 40-25-01, 40-34-05, and 40-22-01(1), has refused to extend the services until this matter is resolved.

Plaintiff seeks a declaratory judgment that she is entitled to water and sewer service, preliminary and permanent injunctions restraining Defendants from preventing her from connection to water and sewer systems, and damages. Jurisdiction is alleged under 28 U.S.C. § 1343 and § 1331 for causes of action stated under 42 U.S.C. § 1983 and § 1985(3). A declaratory judgment is sought under 28 U.S.C. § 2201.

Plaintiff's complaint sets forth three different theories of recovery. Their validity or invalidity bears directly on whether a preliminary injunction should be issued.[1]

Plaintiff's first two theories of recovery are apparently laid under 42 U.S.C. § 1983 (1974), which reads:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within

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[1] I realize that the federal rules have effectively abolished the "theory of the pleadings doctrine." *See* Wright & Miller, *Federal Practice and Procedure*: Civil § 1219 (1969). Accordingly, I should not *dismiss* a complaint for failure to state a claim merely because it does not set forth the precise "legal theory" which would entitle the petitioner to relief. The complaint will stand if I can discover a legal theory which would entitle the petitioner to relief on the facts alleged.

However, where the question is the propriety of the issuance of a preliminary injunction; where the complaint has alleged three alternative legal theories justifying recovery; and where I can perceive no other theories justifying relief on any of the *federal claims* the petitioner might have, in deciding whether to grant a preliminary injunction, I am limited to examining the validity of the legal theories presented in the complaint.

> the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress."

To determine whether Plaintiff has alleged a cause of action under § 1983, the following principles apply:

> "The basic requirements of a § 1983 complaint are: (1) that complained conduct was under color of state law, and (2) that such conduct subjected plaintiff to a deprivation of rights, privileges or immunities secured by the Federal Constitution and laws."

Wilkerson v. City of Coralville, 478 F.2d 709, 710 (8th Cir. 1973). With respect to the second requirement of a § 1983 complaint, the Plaintiff "must allege facts showing that the defendants acted to deprive [her] of the rights, privileges, and immunities *secured by the Fourteenth Amendment of the Constitution.* [Emphasis added.]" *Spears v. Robinson,* 431 F.2d 1089, 1091 (8th Cir. 1970), affirming *Spears v. Mount Etna Morris,* 313 F.Supp. 52 (W.D.Mo.1969).

The Defendants—a city mayor and city councilmen—are acting under color of state law. Thus, the first requirement to state a cause of action under § 1983 is present in each of Plaintiff's first two theories of recovery. The second requirement, though present in the first theory, is not present in the second theory.

Plaintiff's first theory of recovery alleges a denial of equal protection in that the Defendants "have singled out the Plaintiff solely on the basis of race and have so classified her on her basis of race as to a denial of services so provided by the City of New Town, North Dakota." Although Plaintiff thereby alleges that she has been denied access to the city's water and sewer systems because she

is an Indian, this allegation was abandoned by Plaintiff's counsel at the hearing on the motion for a preliminary injunction. Plaintiff conceded that the sole reason the city officials have denied access to her is the fact that her land is now in "trust status." There is no outstanding contention by the Plaintiff that the city officials have indiviously discriminated against her simply because she is an Indian. Thus, the violation of equal protection alleged under § 1983 in Plaintiff's first theory of recovery is that the city officials have refused to give her water and sewer service because her land is now in "trust status."

Plaintiff's second theory of recovery, also apparently laid under § 1983, alleges a deprivation of "her right to hold land in trust status and to the benefits that are derived from such status." I do not read 25 U.S.C. § 465 as creating a "federal right" in favor of individual Indians to have the United States government hold their land in trust for them. The statute cited clearly says that any acquisition shall be in the discretion of the Secretary of the Interior.

Even if I did find such a right to exist, its denial would not be actionable under § 1983, since it is not a right secured by the Fourteenth Amendment or by a federal statute passed by the Congress under the authority thereof. Hence, Plaintiff's second theory of recovery does not state a cause of action under § 1983.

Plaintiff's third theory of recovery is apparently laid under 42 U.S.C. § 1985(3). Title 42 U.S.C. § 1985(3) (1974), as it pertains to this lawsuit, reads as follows:

> "If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . [and] if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereof another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

"The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Griffin v. Breckenridge,* 403 U.S. 88, 102, 91 S.Ct. 1790, 1798, 29 L.Ed.2d 338 1971). *See* also *Means v. Wilson,* 522 F.2d 833, 839 41 (8th Cir. 1975).

Plaintiff's third theory of recovery alleges a conspiracy of the Defendants to "deprive the Plaintiff of her right to equal treatment under the law to water and sewer benefits provided by the city of New Town, North Dakota, and mandated under the Equal Protection Clause under the Fourteenth Amendment to the Constitution." Plaintiff fails to state a cause of action under § 1985(3), however, because she does not allege, or claim, any "invidiously discriminatory animus" behind the actions of the Defendants. *Griffin v. Breckenridge,* supra, 403 U.S. at 102, 91 S.Ct. at 1798. There is no outstanding contention by the Plaintiff that the Defendants have invidiously discriminated against her simply because she is an Indian. Plaintiff contends she is being discriminated against because the land is in "trust status." I do not think this constitutes the "racial, or perhaps otherwise class-based, invidiously discriminatory animus" required to state a cause of action under § 1985(3). *Griffin v. Breckenridge,* supra, 403 U.S. at 102, 91 S.Ct. at 1798.

Consequently, considering Plaintiff's three different theories of recovery, I find that she has stated a cause of action only under the first: i.e., that the Defendants are

denying Plaintiff equal protection by refusing to give her water and sewer service because she occupies land which is in "trust status."

The question now is under what standard of review to evaluate the Defendants' alleged denial to Plaintiff of her right to equal protection. The classification allegedly made by the city officials (those who occupy land in "trust status") is not racial, and access to municipal water or sewer service has not yet been denominated a "fundamental right." I conclude that the Defendants' alleged discriminatory rejection of Plaintiff's application for water and sewer service must be evaluated under the traditional "rational basis" analysis rather than the stricter "compelling state interest" analysis. See *Davis v. Weir,* 497 F.2d 139, 144 (5th Cir. 1974). "[T]he Fourteenth Amendment does not deny to States [or municipalities] the power to treat different classes of persons in different ways. . . . A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' " *Reed v. Reed,* 404 U.S. 71, 75-76, 92 S.Ct. 251, 254, 30 L.Ed.2d 225 (1971). So the alleged unconstitutional classification (those who occupy land in "trust status") must be sustained "if the classification itself is rationally related to a legitimate governmental interest." *United States Department of Agriculture v. Moreno,* 413 U.S. 528, 533, 93 S.Ct. 2821, 2825, 37 L.Ed.2d 782 (1973).[2]

[2] Presently, I do not see this case as involving a problem of "underinclusiveness." For example, if the city has not extended its alleged policy (of refusing water and sewer service to occupiers of "trust" land) to occupiers of "non-trust" land which is tax-exempt, there could conceivably be a problem of "underinclusiveness"; that is, there could be persons "similarly circumstanced" as the Plaintiff who are not being treated as she is. Occupiers of "non-trust" tax-exempt land would be "similarly circumstanced" as the Plaintiff unless their land was:

The standard of review is pertinent because I must decide whether to grant Plaintiff's motion for a preliminary injunction. A party seeking a preliminary injunction "must demonstrate . . . that irreparable damage will follow without the grant of equitable relief and . . . a reasonable probability that the party . . . would ultimately prevail." *Wooten v. First National Bank of St. Paul, Minnesota,* 490 F.2d 1275, 1276 (8th Cir. 1974).

> ". . . may establish just and equitable rates and charges to be paid for the use of [a sewage disposal system] by a person . . . whose premises are served thereby. If the established service charge is not paid when due, . . . such sum may be assessed against the premises served and collected and returned in the same manner as other county and municipal taxes are assessed, certified, collected, and returned."

It is certainly a legitimate governmental interest for a city to be concerned with the collection of sewer service charges. However, a city does not have the option of assessing delinquent sewer service charges against "trust" land, since such land is exempt from local taxation. 25 U.S.C. § 465. The Plaintiff's promise to pay sewer service charges, however honestly made, is not equivalent to the extraordinary remedies which would be available to the city to collect delinquent service charges as a tax assessment. See N.D.C.C. §§ 40-24-01 and 40-25-01 (1968). In this light, is the Defendants' refusal to connect Plaintiff to the sewer system "rationally related" to the legitimate governmental interest of the city in connecting sewer service charges?

1. Vulnerable to special assessments (as opposed to general property taxes).
2. Covered by some kind of "payment-in-lieu-of-taxes" agreement, or
3. Somehow otherwise distinguishable from "trust" land.

In addition, N.D.C.C. § 40-22-01(1) (1968) provides that any municipality may defray, by special assessments, the expense of the "construction of a water supply system, or a sewerage system, or both, or any part thereof, or any improvement thereto or extension or replacement thereof . . . ."

It is certainly a legitimate governmental interest to provide and maintain municipal water and sewer systems; and to do this it is necessary that there be adequate financing available. In North Dakota one means of insuring adequate financing is the cities' ability to levy special assessments. However, again, land which is in "trust status" is "exempt from State and local taxation." 25 U.S.C. § 465 (1963). Is discriminating against those who occupy land in "trust status" that is exempt from assessments of maintenance charges rationally related to the legitimate governmental interest of providing and maintaining municipal water and sewer systems?

Without finally answering the questions I have posed, I feel that Plaintiff has not demonstrated "a reasonable probability that [she] . . . would ultimately prevail." *Wooten v. First National Bank of St. Paul, Minnesota,* supra, 490 F.2d at 1276. Consequently, the request for a preliminary injunction is *denied.*

APPENDIX C

Unpublished Opinion

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
NORTHWESTERN DIVISION

A4-75-71

Filed February 14, 1977

Memorandum and Order

BEULAH CHASE, *Plaintiff,*

vs.

ROLAND MCMASTERS, JACK SMITH, JR., WAYNE TURNER, ARLYN WADHOLM, and RUSSEL PEDERSON, *Defendants.*

This matter has been fully discussed in the Order Denying a Motion for Temporary Injunction which was entered December 20, 1975. That Memorandum and Order is reported in 405 F.Supp. 1297.

While that discussion is fully adopted as though set out in full herein, the matter is presented for final injunction in a slightly changed posture, which, the better to understand, requires a short review of the facts.

Beulah Chase is an enrolled Indian of the Three Affiliater Tribes.[1] Her husband is not an enrolled Indian.

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[1] The Three Affiliated Tribes are the Mandan, the Arikara, and the Hidatsa, or Gros Ventres of the Upper Missouri. All three tribes were organized into agricultural communities, and were horribly decimated by smallpox, which was brought up to them on the American Fur Company steamboat "Saint Peter." She came into the Fort Clark-Fort Union area of the Missouri in June of 1837. Thereafter, cholera in 1851 and another bout with smallpox in 1856, reduced their numbers so low that the Three Tribes banded together around Fort Union and Fort Berthold (Like-a-Fishhook Village) until they were located at the Fort Berthold Reservation established in that area. *Robinson,* History of North Dakota, p. 97.

In 1956 water and sewer were put across the front of Lot 16, Block 3 of Highland Village Addition to Newton, North Dakota.[2]

Lot 16, Block 3 of Highland Village Addition to Newtown went to the City for $335.00 on November 16, 1965. It was resold by the City to Beulah Chase on August 23, 1974, for $1,102.00, that being $702.00 of improvement specials and $400.00 for the lot. On June 23, 1975, Beulah Chase conveyed the lot to the United States in trust for herself under 28 United States Code § 465 (48 Statutes 984). The acquisition was approved October 14, 1975.

Beulah Chase originally explained the transfer in trust as a condition precedent to getting a Housing and Urban Development improvement loan through the Fort Berthold Housing Authority.[3]

In fact there was no such requirement.[4]

In a deposition taken after the preliminary injunction hearing, Beulah Chase stated that the transfer to United States trust status was for the purpose of evading the

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The Mandans are the famous "Welsh Indians." Frontier gossip had them descended from a purported Welsh settlement established in 1170. See *Bernard DeVoto*, Journals of Lewis and Clark, footnote 12, p. 42.

[2] Newton is the principal city and reservation headquarters of Fort Berthold Indian Reservation. With the development of the Garrison Reservoir, Van Hook, Elbowoods, and Sanish were inundated, relocated about three miles east of the Sanish townsite, and renamed "Newton." Its 1976 population was 1428. The Indian population of the Fort Berthold Reservation is 3226.

[3] See averment No. 33 of Plaintiff's complaint.

[4] See Plaintiff's Exhibit No. 1.

[5] Deposition of Beulah Chase, January 31, 1976, p. 14, line 17.

general realty tax.[5] This was confirmed in the deposition of John Chase.[6]

Again, in fact, the expressed policy of the Bureau of Indian Affairs is against this very type of transfer. In a letter issued by the Bureau on May 19, 1974 (one year before the Beulah Chase transfer in trust), the Director of the Office of Trust Responsibilities stated:

> "The Bureau and the Department, since shortly after the passage of the Act of June 18, 1934 (48 Statutes 984), have taken the position of not permitting conveyance of land owned in fee by an Indian to the United States in trust for the owner thereof to avoid the payment of taxes."[7]

After executing the conveyance in trust, Beulah Chase applied to the City authorities for a water hookup. They, however, had been alerted by an unidentified person's sending them a copy of the conveyance.[8]

The matter came up at the next council meeting, a special meeting called to discuss extension of water and sewer to another tract. At that time the council member had heard rumors of a threat by irate property owners to sue the City if it accepted private lots which could not be reached on the tax rolls. The council decided to delay action on the request of Mrs. Chase until it could get an opinion from its attorney.[9] This decision was reaffirmed at a special meeting on September 29, also called to consider other tracts.[10]

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[6] Deposition of John Chase, February 14, 1976, p. 9, line 17 through 25.

[7] Plaintiff's Exhibit No. 2, letter of May 17, 1974, filed with deposition of Mary Rolf.

[8] Deposition of Roland McMasters, January 5, 1976, p. 8, line 18.

[9] Minutes of City Council, September 25, 1976, Plaintiff's Exhibit K.

[10] Minutes of City Council, September 29, 1975, Plaintiff's Exhibit L.

Plaintiff commenced her action eleven days later, October 10, 1975, and at that point the City Council took no further action, waiting to see the outcome of the lawsuit.[11]

The situation presented to the City Council was unique in that it was the first time an individual lot, held in trust by the United States had asked for a tie-in to the City utlilties.[12]

The City had extended utility service and police and fire protection to an Indian housing project outside the city under a contract arrangement.[13]

Also, it had collected from the Indian Agency for extension of water and sewer to the Indian Agency buildings and its housing area within the city under a contract arrangement.[14]

Applying again the reasoning as to the temporary injunction; there remain only two new problems to discuss:

I. Has the Plaintiff demonstrated invidious discriminatory animus, or has she established that she was being discriminated against simply because she was Indian?

The evidence to this point was, at the time of the preliminary injunction hearing, simply that the city had refused to allow her to connect her lot to the city utilities. And at the conclusion of that hearing, the dialogue which appears at p. 12, line 15 through p. 24, line 1, and at p. 36, line 13 through p. 37, line 20, of the transcript of hearing on preliminary injunction, clearly reflected the fact that nothing

[11] Deposition of McMasters, supra, p. 16, line 19.

[12] Deposition of McMasters, supra, p. 12, line 17.

[13] Plaintiff's Exhibit J.

[14] Attachment of Defendants' response to Plaintiff's factual submission, Item 51 of Clerk's file.

more was coming out on the issues of bias. Plaintiff's counsel asserts that "the Court well knows that the Plaintiff's attorney did not concede this point." (That Mrs. Chase had not been invidiously discriminated against as a matter of racial bias.) The only plausible response is that there is a time to remain silent and a time to speak. Ecclesiastes 3-7. Counsel was asked to put in further evidence and elected not to.

Turning back to the motion for permanent injunction, the only evidence of racial bias appears in the testimony of Beulah Chase. At the time of the purchase of the lot, Mrs. Chase and her husband met with the entire City Council.[15]

At that time Mr. Chase carried the conversational load for himself and his wife.[16]

I find that the evidence is not sufficient to establish a prima facie case of bias. When I consider the history of the transaction as outlined above, and the depositions of the members of the City Council, the claims of invidiously discriminatory action taken because of racial bias, is wholly disproved.

II. Is the refusal to tie utilities on to a single lot, which the owner has placed beyond the reach of the taxing authority for the avowed purpose of evading general taxes, an interference with a constitutionally protected right?

Again the answer is no. The problem of special assessments and utilities was covered in the memorandum dealing with the motion for preliminary injunction. But the same logic applies now that the Plaintiff has moved her claim over to the proposition that she has a constitutionally pro-

[15] Deposition of Beulah Chase taken January 31, 1976, p. 4, line 21 through p. 6, line 25.

[16] Deposition of Beulah Chase taken January 31, 1976, p. 7, line 9 through p. 7, line 22.

tected right to evade her fair share of general property taxes.

Nor is the remedy of the city unreasonable. Plaintiff paid $1,102.00 for a city lot with utilities available. She got just that. If she builds now, the police and fire burden increases and the administrative overhead continues. Yet she claims that in contradistinction to all other residents of the city, she should get these services free. [Even if it were disposed so to do, what authority or right would the United States have to impose this burden on the other residents of the community?]

Plaintiff appears to ground this lawsuit on *Davis* v. *Weir*, 497 F.2d 139 (1974). But the cases are not analogous. In *Davis*, supra, the tenant, Davis, was paying his current water bill and his rent, out of which the landlord had to pay the general taxes. But since the landlord would not pay a water bill in arrears, Weir, the City of Waterworks Manager, shut off the services to Davis.

But in this case, the Chases, by their own admission, put the lot in trust for the express purpose of evading local general taxes.

I find that the Plaintiff has failed to establish conduct arising out of racial bias, or inordinately discriminatory conduct by the city officials of the City of Newtown against Beulah Chase.

Therefore,

It Is Ordered, that this action is dismissed on its merits, and that the Defendants receive their costs and disbursements herein.

This Memorandum shall serve as Findings, Conclusions and Order pursuant to Rule 52(a) Fed.R.Civ.P.

Dated this 12 day of February, 1977.

By The Court:

/s/ Bruce M. Van Sickle
Bruce M. Van Sickle, Judge
United States District Court

APPENDIX D

12-18-34

Memorandum for the Commissioner of Indian Affairs:

The attached letter is returned to you for further consideration. The letter in effect holds that an Indian owning taxable land may convey such land to the United States to be held in trust for the individual Indian. Obviously this is a matter which will affect large numbers of Indians other than the particular applicant referred to in the attached communication.

Authority for such a transaction is to be found, if at all, only in section 5 of the act of June 18, 1934, which provides:

> "The Secretary of the Interior is hereby authorized in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians."
>
> * * * *
>
> Title to any lands or rights acquired pursuant to this action shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation."

It is questionable, from a strictly legal point of view, whether such a transaction as that referred to falls within the declared purpose "of providing land for Indians." Aside from the narrow question of legality, it is believed that a matter of this sort should receive further consideration as to the policy involved than has apparently been given to the attached communication. Is it the intention of the

Indian Office to eliminate taxation on all Indian lands now taxable? If not, by what criterion does the Indian Office propose to determine when an Indian owner of taxable land may avoid taxation through a transfer of the land to the United States Government followed by the receipt of a trust patent?

It may be noted that the last paragraph of the attached communication embodies an erroneous interpretation of section 4 of the act of June 18, 1934. The quoted comment is inconsistent with the opinion of the Solicitor dated November 7, 1934 holding that devices other than heirs at law under wills of restricted Indians covering lands within the scope of the Wheeler-Howard Act must be members of the tribe having jurisdiction over the lands in question.

The foregoing refers to your letter dated November 27, addressed to the Superintendent of the Fort Totten Indian Agency. There is also returned your letter of October 29, addressed to the Superintendent of the Fort Berthold Indian Agency, suggesting in a somewhat similar case that land patented in fee to Byron H. Wilde, may be conveyed to the United States in trust for the patentee's wife, under section 5 of the Wheeler-Howard Act. The considerations of policy referred to above apply with equal force to this case.

Solicitor.

APPENDIX E

Taxable Property—Assignment to U.S. in Trust

April 4, 1935.

Memorandum for the Comissioner of Indian Affairs.

I am entirely in agreement with the opinion expressed in your memorandum of April 2, 1935, that it would be within the letter and spirit of the Act of June 18, 1934 (48 Stat. 984), to accept from an Indian owner taxable property title to the same "with the understanding that it will be held in trust and assigned to her and her heirs for so long as they may care to occupy and use same" wherever there is a reasonable probability that such acquisition will serve the purpose of land consolidation.

It does not seem to us, however, that the letter prepared for Superintendent Gray conforms to this statement of policy. Another, that letter suggests that the Indian applicant is to receive a trust patent or restricted legal title to the land which she now owns. In other words, there would be simply an imposition of restrictions upon land now owned by an Indian, without effectuating any other change in the tenure by which the land is held. It was to this latter procedure that my memorandum of December 18, 1934, to which your memorandum of April 2, 1935, is an answer, was specifically directed.

As suggested in my earlier memorandum, I doubt it can be fairly said that we are providing land for Indians, within the meaning of Section 5 of the Act of June 18, 1935, when we take legal title to Indian owned land and issue to the original Indian owner a restricted title to the same land.

This legal question does not arise if it is the intention of the Indian Office to acquire title in these cases in trust for a given Indian tribe and to issue to the original Indian owner an assignment conveying exclusive rights of use and occupancy. In this case I think it could fairly be said that the land was acquired for the benefit of the tribe concerned.

If the assignee or her legal heirs or devisees should at any time cease to use and occupy the land, it would revert to the tribe for reassignment to other members of the tribe. (Landless) Indians would thus be benefited by this transaction, and although the extent of benefit is small this is immaterial since no actual outlay for compensation is involved in the transaction. The question of whether assignments should be controlled by the Secretary of the Interior directly, or by the tribe itself, or by the Secretary until the adoption of a tribal constitution, and thereafter by the tribe, in accordance with such constitution, is primarily a question of policy for the Indian Office to determine. Whatever instrument of assignment may be used for the contemplated transaction should contain specific provisions on this matter as well as on rights of leasing, transfer and inheritance.

If I am correct in my understanding of the plan contemplated by your memorandum of April 2, 1935, I would suggest that the attached letter for Superintendent Gray be revised so as to state clearly the nature of the interest which the assignee of the land will receive. The last paragraph of the letter assumes that the present owner will receive an allotment rather than an assignment, and should, therefore, be deleted.

Solicitor.

APPENDIX F

OFFICE OF THE SOLICITOR
WASHINGTON 25, D. C.

June 16, 1945

MEMORANDUM for the Commissioner of Indian Affairs:

Reference is made to the memorandum of March 31 concerning the proposed conveyance of 86 acres of land in Lake County, Montana, from Alphone Clairmont, Guardian for Victor Leonard Clairmont, a minor, to the United States in trust for Victor Leonard Clairmont an unallotted Flathead Indian. Your reference number is Ten. & Acq. 3958-45.

An examination of the abstract reveals that in 1920, pursuant to Secretarial order, patent in fee for the land in question was issued to Victor Clairmont, Flathead allottee No. 945 (abstract p. 2). On January 28, 1927, the patentee died intestate and Victor Leonard Clairmont, the Guardian's ward, was determined to be the sole surviving heir of the deceased (abstract p. 35). On the basis of the record presented, it is assumed in the absence of a showing to the contrary, that prior to the approval of the Secretary's order for the issuance of patent in fee, all the necessary requirements concerning application for fee patent had been complied with.

The authority relied on to effect the proposed transfer is section 5 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984, 25 U. S. C. sec. 465) which authorizes the acquisition of land through purchase, relinquishment, gift, exchange or assignment "for the purpose of providing land for Indians." As previously indicated, however, title to the property in question is now vested in the Indian minor, Victor Leonard Clairmont (abstract p. 35). The Solicitor in discussing a similar situation held that the proposed conveyance would not be "providing land for Indians" within the meaning of section 5 of the 1934 act. Solicitor's memorandum of April 4, 1935 to the Commissioner of Indian

Affairs. A review of the file discloses that the main purpose of the transfer is to place the property in a trust status to avoid the payment of taxes.

It has been the Department's policy in such cases not to permit Indians to transfer lands now taxable to the Government. Letter of May 3, 1935 to the Superintendent of the Fort Totten Agency approved by the Department on May 7, 1935. See also Department's letter of March 2, 1943 to the Superintendent of the Five Tribes Agency. Consequently, there would seem to be no authority under section 5 of the 1934 act to effect the proposed transfer. The Solicitor has held, however, that there is authority under the act to acquire title in trust for an Indian tribe and to issue to the original Indian owner an assignment conveying exclusive rights of use and occupancy. Solicitor's memorandum of April 4 *supra*. See also letter of May 3, 1935 *supra*. If the parties in interest desire to convey the property to the Flathead tribe, the procedure set forth in the letter of May 3, 1935 should be strictly followed.

The deed, abstract and related papers are returned.

/s/ W. H. Flanery,
For the Solicitor,
Assistant Solicitor.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

City of Tacoma, Washington, et al., *Plaintiffs*,

v.

Cecil D. Andrus, et al., *Defendants*.

Filed January 20, 1978

Memorandum Opinion and Order

A recently adopted, ill-considered, and unfortunate practice of the Department of the Interior provides the grist for this lawsuit. The Department, acting through the Bureau of Indian Affairs (BIA), has begun to accept title to isolated tracts of land scattered throughout the City of Tacoma, Washington, and owned prior to transfer in fee simple by the Puyallup Tribe of Indians (the "Tribe") or any of its members. Havings accepted title, the United States then holds the land in trust for the beneficial use of the Tribe or the individual Indian. Once title rests with the United States, the "beneficial" owners renounce the civil, tax, and criminal jurisdiction of the state and its subdivisions by refusing to pay taxes, ignoring zoning, health, and safety codes, and openly violating state and local prohibitions of cigarette, liquor, and fireworks sales.

Tacoma encompasses a heavily industrialized and settled area, 99% of whose residents are non-Indian. Predictably the Department's practice has generated not only considerable public hostility but this legal action against the BIA and the Department of the Interior as well. Plaintiffs are the City and Port of Tacoma, four residents, two adjacent municipalities, and the county encompassing all of them. They seek, *inter alia*, a declaration that decendants' acceptance of land in trust for Puyallup Indians exceeds statutory authority, an injunction prohibiting future acceptance

of fee-patented, privately owned land in trust for the Tribe or any of its members, as well as declarations that the original Puyallup reservation has been disestablished and that any lands already taken in trust are subject to all general state and local regulations and taxes.

Plaintiffs sought a temporary restraining order, which was rendered moot by defendants' agreement to abstain from the practice in question pending the Court's resolution of the merits.[1] After intervening as a party defendant, the Tribe then filed a motion to dismiss the complaint under Rule 12b(6) of the Federal Rules of Civil Procedure. Defendants filed a similar motion. Opposition and replies were thereafter submitted, oral argument was heard, and the Court invited post-argument submission of additional authorities. The motions are now ready for adjudication.

Plaintiffs' principal claims withstand dismissal. The first relates to the Secretary's authority to accept land in trust for the Tribe or any of its members. As authority for the challenged practice, defendants[2] cite section 5 of the Indian Reorganization Act of 1934, 25 U.S.C. § 465 (1970). That statute, in relevant part, provides:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights or surface rights to lands, within

[1] By Consent Decree entered on August 18, 1977, defendants agreed not to accept title to any land held by a Puyallup Indian or the Tribe pending resolution of plaintiffs' motion for preliminary injunction. The parties subsequently agreed to forego preliminary relief and seek final resolution of the case, and the Consent Decree continued by agrement. Since the Court does not now resolve the substantive issues in the case, the Consent Decree continues in effect.

[2] Both the original defendants and the Tribe are hereinafter collectively referred to as "defendants."

> or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians.
>
> ....
>
> Title to any lands or rights acquired pursuant to [this Act] shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

Defendants claim that these provisions vindicate their practice, and that in any event plaintiffs lack standing even to contest the issue.

To establish standing, each plaintiff must establish, first, that the action complained of has caused "injury in fact" and, second, that the interest sought to be protected is "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 152-53 (1970). Plaintiffs City of Tacoma and County of Pierce meet these requirements. Their claims of tax losses and frustration of police powers are sufficient to establish "injury in fact." With regard to the "zone" test, the government's assumption of title to land within their jurisdiction has profound, if as yet uncertain, effect on the power of these plaintiffs over the land and those on it. The statute itself denied plaintiffs the power to tax the land. Thus there is no question that these governmental entities have interests that are "regulated" by section 5 of the Act.[3]

[3] Tax Analysts and Advocates v. Blumenthal, No. 75-1304 (D.C. Cir. June 15, 1977), although it contains broad dicta, does not require a contrary result. In that case a domestic oil producer was denied standing to challenge the tax treatment of foreign oil producer on the grounds that his competitive interests were not among those protected or regulated by the Revenue Ruling in question.

The remaining plaintiffs have no standing to question the Secretary's authority. The Port of Tacoma, Town of Milton, and City of Fife have all failed to establish "injury in fact." Neither the complaint nor any supporting affidavit allege that any land has been taken within these areas nor do they suggest any other injury that may have been suffered. The individual plaintiffs fail the second test, for it cannot be said that the statute operates to protect or regulate their interests. Plaintiffs suggest that a broader test should apply: that because the statute has a foreseeable impact on their interests, they should be deemed to have satisfied the "zone" test. Alternatively, they argue that the test should be relaxed because they are suffering a harm that was not contemplated at the time the Act was passed. Although not without legal support, *see Cotovsky-Kaplan Physical Therapy Association* v. *United States*, 507 F.2d 1363, 1366-67 (7th Cir. 1975) (Stevens, J.); *American Society of Travel Agents, Inc.* v. *Blumenthal*, No. 75-1782, slip op. at 19-21 (D.C. Cir. Sept. 15, 1977) (Bazelon, C.J., dissenting) (citing cases); *K. Davis, Administrative Law of the Seventies* § 22.02-11 (1976), a recent decision of the United States Court of Appeals for the District of Columbia Circuit has expressly rejected both, adhering strictly to the requirements that the interests sought to be vindicated must be among those arguably either protected or regulated by the statute in question. *Tax Analysts and Advocates* v. *Blumenthal*, No. 75-1304, slip op. at 25-26 (D.C. Cir. June 15, 1977). Under *Tax Analysts*, only the City of Tacoma and the County of Pierce have standing to question the Secretary's authority.

In this case, the interests of the city and the county are not competitive, but rather, jurisdictional, and as such were sought to be regulated in the statute in question. *See also* Southern Mutual Help Ass'n, Inc. v. Califano, No. 76-1748, slip op. at 12 (D.C. Cir. Dec. 23, 1977).

Turning to the merits of the attack on the Secretary's authority, it is obvious from the language of section 5 that it authorizes the Secretary to accept land in trust not only for Indian tribes but for individual Indians as well.[4] The Secretary's power, however, is not unlimited. The statute itself permits acquisition only "for the purpose of providing land for Indians." The legislative history is replete with statements to the effect that section 5 was meant only "[t]o meet the needs of landless Indians and of Indian individuals and tribes whose land holdings are insufficient for self-support." S. Rep. No. 1080, 73d Cong., 2d Sess. 2 (1934). *Accord*, H.R. Rep. No. 1804, 73d Cong., 2d Sess. 6 (1934); 78 *Cong. Rec.* 9269 (Rep. Hastings), 11123 (Sen. Wheeler), 11727, 11730 (Rep. Howard) (1934). Acceptance of trust land for any other purpose is unauthorized.

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[4] This is most clearly demonstrated by a comparison of the bills as reported out of the respective committees and the bill as eventually adopted. Originally the last paragraph of section 5 provided:

> Title to any lands or rights acquired pursuant to this Act shall be taken in the name of the United States in trust for the Indian tribe for which the land is acquired . . . .

H.R. Rep. No. 1804, 73d Cong., 2d Sess. 3 (1934). A Senate amendment to the bill made on June 12, 1934, inserted the words "or individual Indians" after the words "Indian tribe." This amendment was initially resisted by the House, but the Senate version was adopted in conference. Any doubt as to the purpose and meaning of this amendment is dispelled by examination of the remarks immediately prior to passage:

> So far as I am concerned, I want the bill amended, if that be possible, so as to provide that the money shall be available not only to buy lands for additions to Indian reservations but to buy lands for individual Indians. There is no chance to place them on reservations. They are living along the creeks in tepees and tents. I want the money available to buy lands not only in my state for individual Indians but in other states where Indian lands have been allotted.

78 *Cong. Rec.* 11125 (1934) (Sen. Thomas).

One can easily imagine circumstances in which a taking would be in excess of authority. For example, were the Secretary to accept title from an individual competent Indian, simply to hold the same land in trust for him, the statutory authority would appear to have been abused, for in no sense could the Secretary be said to be providing land. To hold that an Indian may become landless or nearly so, and thus eligible for beneficial use of trust land, simply by transferring absolute title to the United States would make a mockery of a statute obviously designed to augment, not merely transform, title to land available to Indians.[5]

One can just as easily imagine circumstances in which a taking would be completely authorized. The legality of the

[5] This appears to have been the opinion of the Department, at least in the period immediately following passage of the Act. *See* Memoranda from the Solicitor of the Department of the Interior to the Commissioner of the Bureau of Indian Affairs (Dec. 18, 1934; Apr. 4, 1935). Defendants now deny that even the hypothetical taking described above would be illegal. One of the purposes of the 1934 Act, it is argued, was to end the progressive alienation of Indian land that had resulted from coercion and the operation of state tax and inheritance laws. Placing fee simple land in trust status saves it from possible alienation, and thus accords with the spirit of the Act. It is true that preventing further alienation was one purpose of the Act. *E.g.*, S. Rep. No. 1080, 73d Cong., 2d Sess. 1 (1934). That purpose, however, was addressed in sections 1-4 of the Act, not section 5 under whose authority the Secretary purports to operate. Sections 1-4 deal with the alienation problem by prohibiting transfers and allotments of Indian land, extending indefinitely the trust status of all restricted lands, and returning certain "surplus" lands to tribal sovereignty. 25 U.S.C. §§ 461, 462, 463, 464 (1970). Section 5 was adopted for a different, albeit complementary purpose. As the bill's House sponsor explained, sections 1-4 "are designed to prevent further loss of Indian land. But prevention is not enough. The Indians now landless must be provided for. [Section 5] undertakes to do this gradually through an annual appropriation for the purchase of land." 78 *Cong. Rec.* 11727 (1934) (Rep. Howard). Thus the hypothetical instance described above would violate both the letter and the spirit of section 5 and would thus be unauthorized.

taking depends upon, among other things, who the grantor is, his relation, if any, to the grantee, and the grantee's needs and landholdings. None of this information is before the Court, and to interpret the statute through a series of hypotheticals would be to engage in the typical advisory ruling prohibited by *Muskrat* v. *United States*, 219 U.S. 346 (1911). At the same time, dismissal is inappropriate, since it cannot be said that those plaintiffs with standing "would be entitled to no relief under any state of facts which could be proved." 2A *Moore's Federal Practice* ¶ 12.08 at 2271-74 & n.6 (1968) (citing cases).

After this lawsuit was filed, the Secretary announced the following change in the Department's Puyallup land acquisition practice:

> Until final regulations are adopted, the Department is going to insist that any land which is proposed to be taken in trust for the Puyallup Tribe or Puyallup Indians be a part of a tribal land consolidation plan or that it be for some other clearly defined purpose which will benefit the entire tribe.

Letter from Cecil D. Andrus to Senator Henry M. Jackson (Oct. 14, 1977). This development is long overdue. It does not, however, require dismissal of plaintiffs' challenge to the Secretary's authority, as defendants suggest. Plaintiffs seek not only an injunction against future takings but also a declaration as to the legality of the acquisitions already completed. Furthermore, the letter is too vaguely worded to determine whether it precludes future unauthorized takings. As noted, the standard is not whether a taking "will benefit the entire tribe," but rather whether it provides land for Indians or tribes in need.

Plaintiffs' second principal claim is that the lands taken in trust for Indians or the Tribe are subject to certain unspecified state and local regulations and taxes. This claim too is not susceptible to adjudication at this time. In

the first place it is contingent upon the Secretary's authority, for if the transfers have been illegal then the land in question is not properly in trust status. In the second place, even if the land is properly held in trust, the exact degree of freedom from local control provided by trust status is a matter than can be decided only in the context of specific tracts, laws, and violations. *See Santa Rosa Band of Indians* v. *Kings County*, 532 F.2d 655, 669 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977). Resolution requires an understanding of the facts as well as the law, and therefore dismissal of the claim at this time is inappropriate. *Moore's Federal Practice, supra.*[6]

The parties have briefed and argued the question of the continued existence of the original Puyallup reservation. All agree, however, that the question is a collateral one that, depending on the Court's resolution of other questions, may never need to be decided. Obviously, then, any decision at this time would be purely advisory.

The complaint also lists subsidiary claims that the procedures followed in taking the land in question denied plaintiffs due process of law; that such takings contravened § 102(2)(c) of the National Environmental Policy Act, 42 U.S.C. § 4332 (Supp. V 1975); and that section 5 of the Indian Reorganization Act is an unconstitutional delegation of legislative power without adequate standards. By all appearances, these claims have been abandoned. In any event, they are completely without merit and thus are dismissed.

From the outset of this lawsuit the Court has expressed its doubt that the case could be fully resolved in a jurisdiction so far removed from the land around which the dispute

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[6] The Court finds it unnecessary to determine finally the various plaintiffs' standing to raise this claim, although it appears that at least the City of Tacoma and County of Pierce do have standing, for the reasons outlined above.

centers. Transfer has thus far been abstained from because of the parties' representations that no active federal judge is presently sitting in Tacoma. As the litigation progresses, however, and as the issues are narrowed, it appears even more clearly that further proceedings in this Court may be inappropriate. The outstanding questions are closely tied to the individual tracts of land. Especially with regard to the issue of tax and regulatory jurisdiction, the beneficial owners of the land would seem to be indispensable parties within the meaning of Rule 19(b) of the Federal Rules of Civil Procedures. Therefore, and for the reasons stated above, the Court hereby ORDERS:

(1) Plaintiffs' claims of denial of due process, violation of the National Environmental Policy Act, and unconstitutional delegation of legislative power are dismissed;

(2) In all other respects the motions to dismiss are denied;

(3) Plaintiffs Port of Tacoma, Town of Milton, City of Fife, Fred R. Remeto, Mary Jean Remeto, Frank M. Williams, and Edith K. Williams are dismissed without prejudice; and

(4) Inasmuch as the Court now confronts questions involving detailed factual considerations and affecting rights of persons not presently before the Court, all parties are directed to show cause in writing on or before February 6, 1978, why the case should not be transferred to the West-District of Washington.

So Ordered.

/s/ Gerhard A. Gesell
United States District Judge

January 20, 1978.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-438

ROLAND MCMASTERS, JACK SMITH, JR., WAYNE TURNER, ARLYN WADHOLM AND RUSSEL PEDERSON,
Petitioners,

v.

BEULAH CHASE, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

RICHARD B. COLLINS
RAYMOND CROSS
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302
Telephone: 303/447-8760

ROBERT A. MANDEL
North Dakota Legal Services
New Town, North Dakota 58763
Telephone: 701/627-4719

Attorneys for Respondent

October 1978

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RESPONDENT'S BRIEF IN OPPOSITION

QUESTIONS PRESENTED

1. Does 25 U.S.C. 465 prohibit the Secretary of the Interior from taking Indian trust title to a parcel of land previously owned in fee by the Indian beneficiary?

2. Did defendants unlawfully interfere with plaintiff's federal statutory rights under 25 U.S.C. 465?

3. Did the court below have jurisdiction to decide this case on its merits?

STATEMENT

Petitioners' Statement misstates in part the issues actually presented by the record and fails to mention certain pertinent matters of record. However, it is more convenient to call attention to these points under the discussion of particular issues below.

THE WRIT SHOULD BE DENIED

I. The Petition Does Not Accurately State the Issues Presented by the Record

The petition first overstates the breadth of the holding below, then asks this Court to review issues not properly presented by the record. Review should not be based on such matters.

A. Defendants say that the Court of Appeals held that they must provide municipal services to all Indian trust lands "and that such trust lands may not be taxed or regulated in any manner by state and local governmental units." Pet. 6-7. This much overstates the holding below. The Court of Appeals carefully restricted its opinion to the particular facts of the case, that is, water and sewer service to trust land where plaintiff had already paid the assessment charge and was willing to pay all costs of service. Pet. 10a-11a. The court expressly reserved issues of municipal regulation of such land. Pet. 10a n.7, first ¶. Tax exemption was not a holding of the court but rather a premise of all parties as well as the court. And the court expressly did not reach the question of other municipal services or the question of services not paid for. Pet. 11a.

B. Plaintiff in the trial court made three claims, one based on denial of equal protection, one based on interference with federal statutory rights under 25

U.S.C. 465, and one based on 42 U.S.C. 1985. Pet. 16a-19a. In answer to the second claim, defendants pleaded that plaintiff's land was improperly placed in trust under 25 U.S.C. 465. Defendants' Answer ¶ VI. However, defendants pursued that defense in the District Court and Court of Appeals solely as an issue of the facial interpretation of the statute. At no time did they argue that even if the statute applies on its face, its application on these facts amounted to an abuse of discretion. At no time did they seek to add the Secretary of the Interior as a party under Rule 19 or to create a detailed administrative record. They agreed to the submission of the case to the trial court on affidavits and documents as appropriate for summary judgment. Only now, after the Court of Appeals has ruled against them on the issue of statutory interpretation, do they seek to argue the additional point of abuse of discretion and to complain about inadequacy of the record. Pet. 9-11.

This question is not appropriately presented for review by this Court. The administrative action of the Secretary in taking trust title to the land at issue is presumptively valid. *Federal Communications Com'n.* v. *Schreiber,* 381 U.S. 279, 296 (1965). The burden is on the party claiming otherwise, here defendants. They chose in both courts below to contest the matter based on facial construction of the statute. They cannot now complain about inadequacy of the record on an issue where they had the burden to make that record.

Further, the administrative standards that govern the land here will apparently soon be superseded. The Secretary has proposed new regulations interpreting 25 U.S.C. 465. 43 Fed. Reg. 32311 (1978). Thus the

standards which defendants ask to be reviewed likely apply to very few official actions and only past ones.

C. Defendants' discussion questions whether the land at issue is within the boundaries of the Ft. Berthold Indian Reservation. Pet. 6 n.1. This has no bearing on the instant case for the following reasons:

1. On the face of 25 U.S.C. 465, the statute applies within or without Indian reservations. It is thus irrelevant to a construction of the statute whether the land here is within the Ft. Berthold Reservation. Even if the location might bear on an abuse of discretion claim, there is no proper record to present such a claim. *See* the discussion under B. above.

2. Defendants in the trial court stipulated that the land at issue is within the boundaries of the Ft. Berthold Indian Reservation, and their Statement to this Court appears to renew the admission. Pet. 4. The matter was never contested, and there is no record addressing it.

3. The existing decision on the Ft. Berthold Reservation boundaries is correct. *City of New Town* v. *United States,* 454 F.2d 121 (8th Cir. 1972). The legal standard is to examine the particular laws respecting each reservation. *Rosebud Sioux Tribe* v. *Kneip,* 430 U.S. 584 (1977). In *Long Elk* v. *United States,* 565 F.2d 1032 (8th Cir. 1977), the Court of Appeals found no diminishment under the standards of *Rosebud* of a reservation in North and South Dakota whose situation is similar in a number of respects to Ft. Berthold.

II. The Court of Appeals Correctly Construed and Applied 25 U.S.C. 465

On the merits petitioners differ with the Court of Appeals on the construction and application of 25 U.S.C. 465. As their principal point they say that as a matter of law Section 465 does not allow the Secretary of the Interior to take Indian trust title to land previously held in fee by the Indian beneficiary. The Court of Appeals addressed this issue in light of the words of the statute, its legislative history, and its purposes. So also did District Judge Gesell in *City of Tacoma* v. *Andrus,* Dist. Ct. for the Dist. of Col. No. 77-1423, a case relied on heavily by petitioners. Pet. 8, 16. Judge Gesell's opinion on this issue (dated September 19, 1978) is printed as an appendix to this brief. Both the court below and Judge Gesell concluded this issue against petitioners, and we refer to and rely on the reasoning and analysis of both courts. Pet. 4a-7a and pp. 8a-10a below. Also, this Court reached the same conclusion interpreting a similar statute in *Creek County* v. *Seber,* 318 U.S. 705 (1943).

As a secondary point defendants contest the Court of Appeals' conclusion that defendants' refusal of water and sewer service (which plaintiff had already paid them for) impaired plaintiff's beneficial use of her land. This point is not well taken. The Court of Appeals considered the matter on the particular facts presented: where plaintiff had already paid the assessment charges and was willing to work out payment of other fees and charges. Pet. 10a-11a. As the court noted, North Dakota law expressly allows for such arrangements respecting land exempt from assessments. N.D. Cent. C. § 40-23-08 (1960); Pet. 11a. Also, the record shows that defendants have made such arrangements respecting other tax exempt land. Pet. 26a.

Under these circumstances, the Court of Appeals found no justification for refusal of service to plaintiff other than as an attempt to compel her to forgo any benefits of trust status for her land. Pet. 10a. The court expressly stated that it was not finding a duty to provide all municipal services to Indians residing on trust lands, and the court relied on plaintiff's willingness to pay for services. Pet. 11a. On the facts of this case the holding was correct.[1]

III. The Court Below Had Jurisdiction to Decide the Merits

Defendants make a detailed challenge to the applicability of 42 U.S.C. 1983. Pet. 23-34. However, the proper question is whether the court below had jurisdiction to decide the merits of the case. We think it clearly had.

A. This Court has on numerous occasions sustained the jurisdiction of the federal courts to adjudicate claims against state officials based on federal Indian rights. *Moe* v. *Confederated Salish & Kootenai Tribes,* 425 U.S. 463 (1976); *Oneida Indian Nation* v. *County of Oneida,* 414 U.S. 661 (1974); *United States* v. *Minnesota,* 270 U.S. 181 (1926); *Heckman* v. *United States,* 224 U.S. 413 (1912); *United States* v. *Rickert,* 188 U.S. 432 (1903).

[1] Defendants' further argument that the Supremacy Clause is inapplicable because no state enactment or rule was directly struck down is frivolous. Pet. 34-37. The Supremacy Clause applies to any form of official action under state law which conflicts with federal statutory rights. *See* Testa v. Katt, 330 U.S. 386 (1947). The fact that defendants' action violated federal rights only as applied to particular facts, rather than on the face of the laws giving them their authority, is irrelevant. *Cf.* Fisher v. District Court, 424 U.S. 382 (1976).

B. The Court of Appeals' interpretation of 42 U.S.C. 1983 is correct. *Confederated Salish & Kootenai Tribes* v. *Moe,* 392 F.2d 1297, 1304 (D.Mont. 1974), *aff'd on other grounds sub nom., Moe* v. *Confederated Salish & Kootenai Tribes,* 425 U.S. 463 (1976); *see also, Lynch* v. *Household Finance Co.,* 405 U.S. 538, 543 n.7 (1972); *Greenwood* v. *Peacock,* 384 U.S. 808, 829 (1966); *United States* v. *Price,* 383 U.S. 787, 797 (1966); *Sanders* v. *Conine,* 506 F.2d 530 (10th Cir. 1974); *Blue* v. *Craig,* 505 F.2d 830, 834 (4th Cir. 1974); *Gomez* v. *Florida State Employment Service,* 417 F.2d 569 (5th Cir. 1969); *Quinault Tribe* v. *Gallagher,* 368 F.2d 648 (9th Cir. 1966), *cert. denied,* 387 U.S. 907; *cf., Bomar* v. *Keyes,* 162 F.2d 136 (2d Cir. 1947), *cert. denied,* 332 U.S. 825.

C. As previously noted, plaintiff pleaded an equal protection claim as well as the Supremacy Clause claim sustained by the Court of Appeals. That claim was the focus of much of the proceedings in the District Court. The courts below had jurisdiction to entertain that claim under 42 U.S.C. 1983 and 28 U.S.C. 1343(3)[2] unless it was "completely devoid of merit." *Hagans* v. *Levine,* 415 U.S. 528, 543 (1974). If jurisdiction was properly so acquired, it was correct to proceed to decide the Supremacy Clause claim and to address it before the constitutional claim. *Id.* As stated there, the federal courts are "particularly appropriate bodies" for Supremacy Clause cases. *Id.* at 550.

The equal protection claim here was at least as substantial as that in *Hagans.* There the classification was between two groups of welfare recipients. Here it dis-

[2] Plaintiff also pleaded jurisdiction under 28 U.S.C. 1331(a) and the jurisdictional amount. Pet. 16a.

advantaged Indians living on Indian trust property. *Cf., Acosta* v. *San Diego County,* 126 Cal.App.2d 455, 272 P.2d 92 (1954). Also, denials of municipal services have been addressed in equal protection terms. *United Farmworkers* v. *City of Delray Beach,* 493 F.2d 799 (5th Cir. 1974); *Hawkins* v. *Town of Shaw,* 451 F.2d 1171 (5th Cir. 1972); *see also, Davis* v. *Weir,* 497 F.2d 139 (5th Cir. 1974).

CONCLUSION

For the reasons stated, the writ should be denied.

Respectfully submitted,

RICHARD B. COLLINS
RAYMOND CROSS
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302
Telephone: 303/447-8760

ROBERT A. MANDEL
North Dakota Legal Services
New Town, North Dakota 58763
Telephone: 701/627-4719

Attorneys for Respondent

October 1978

APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-1423

CITY OF TACOMA, WASHINGTON, ET AL., *Plaintiffs,*

v.

CECIL D. ANDRUS, ET AL., *Defendants;*

THE PUYALLUP TRIBE OF INDIANS, *Intervening Defendant.*

Memorandum Opinion

(filed September 19, 1978)

Section 5 of the Indian Reorganization Act of 1934 authorizes the Secretary of the Interior, "in his discretion," to acquire land or any interest therein "for the purpose of providing land to Indians." 25 U.S.C. § 465 (1970). This case involves a dispute over the proper interpretation of this increasingly important but rarely litigated federal statute. The dispute arose when the Secretary, acting through an area director of the Bureau of Indian Affairs (BIA), began accepting title to various tracts of land in the Tacoma, Washington, area for the beneficial use of the Puyallup Tribe of Indians and certain of its enrolled members.

The area surrounding Tacoma largely coincides with the historic boundaries of the Puyallup nation. As a result of bargains, treaties, allotments, distress sales, and other factors, however, Puyallup landholding and activity in the area drastically declined to a point where the Tribe's continuity was threatened. The Secretary's trust takings are a response, however belated, to this situation and an attempt to restore some land and a modicum of self-support to this almost destitute Tribe and its members.

I.

Tacoma is now an industrialized and settled area, 99% of whose inhabitants are non-Indians. The Secretary's action generated considerable local hostility, particularly since whenever the Tribe or any of its members became the beneficial owner, it renounced or disputed the civil, tax, and criminal jurisdiction of the city.

In August 1977, the City of Tacoma, adjoining municipalities, and some local non-Indian residents filed this suit to enjoin the Secretary and his delegates from any future takings in trust. Extensive collateral relief was also sought, including a declaration that such lands as had been taken are subject to local taxation and regulation, notwithstanding their trust status. Plaintiffs applied for a temporary restraining order, and argument was heard. The issue became moot, however, when the Secretary offered to sign a "Consent Decree," under the terms of which further takings for the Puyallup Tribe or its members would be held in abeyance pending some resolution of the dispute by the Court.[1] Shortly thereafter the Tribe waived its sovereign immunity, and its motion to intervene as a party defendant under Rule 24(a) of the Federal Rules of Civil Procedure was granted.

The original complaint was diffuse and, even as subsequently amended, attempted to raise a number of nonjusticiable issues, some of which were later abandoned as irrelevant. The Tribe immediately moved to dismiss on several grounds, and defendants joined in this motion. Plaintiffs

[1] The scope of this Consent Decree, signed by another Judge of this Court, has been uncertain from the outset. On its face the Decree purports to bind defendants only until a resolution of a proposed motion by plaintiffs for a preliminary injunction. Such a motion, however, was never perfected, and thus, although defendants have taken no land in trust in the interim, the parties have never resolved the continued validity of the Decree. It was accepted as in effect pending this opinion.

duly opposed, and the matter was fully, if somewhat confusingly, argued. Certain claims and parties were dismissed in a Memorandum Opinion issued on January 20, 1978. The Court refused to dismiss the entire complaint, however, because upon its reading of the statute, the validity of the trust takings rested upon questions of fact as well as law and thus could only be determined on a case-by-case basis. Moreover, although jurisdiction and venue technically existed, the Court expressed serious doubt as to the propriety of adjudicating these questions in such a remote jurisdiction.

Following the January Memorandum Opinion, plaintiffs filed yet another amended complaint, precipitating a further battery of motions. The Court encouraged the parties to consider a transfer to the Western District of Washington because of the absence of some parties in interest and the local aspects of the dispute. All parties strongly resisted transfer, however, because of the importance of prompt decision which could not be obtained by transfer due to the tremendous civil caseload in the Western District and the lack of any active federal judge sitting in the Tacoma Division. The Court in the end agreed to retain and adjudicate a *portion* of the case, namely the validity of the trust taking of those parcels of land the grantors and beneficial owners of which would also appear and consent to the jurisdiction of the Court. The Court made it clear that in no event would it determine the extent of local jurisdiction over these or any other tracts, since this was a matter requiring adjudication by a court familiar with the laws and practices of the area. The Court indicated that following decision the validity of trust takings properly before the Court the remainder of the case would be transferred.

II.

The grantors and beneficial owners of four parcels intervened, and on July 5, 1978, an evidentiary hearing was held regarding these tracts. Relying primarily on docu-

mentary proof, plaintiffs presented one witness, a city engineer who testified that he had inspected a building on one of the tracts and found it to be in violation of several municipal code provisions. Defendants produced the area officer who authorized the takings and a policy-level official of BIA, both of whom related the policies of and factors considered in the trust land acquisition program. They testified that the BIA was well aware of the meager resources of the Puyallup Tribe, as well as other small tribes in the Pacific Northwest, and that the agency's practice in the area was to accept land in trust subject to the following guidelines:

> (a) That the title to the parcel of land be clear of all tax liens or other encumbrances and that there be a commitment from a title company to insure the title;
>
> (b) That the proposed beneficial owner be an enrolled member of an Indian tribe;
>
> (c) That the parcel in question be within the boundaries of a reservation established for the tribe of which the proposed beneficial owner is a member;
>
> (d) Where a proposed beneficial owner is not an enrolled member of the Tribe for which the reservation was set aside, the Tribal Council is to be advised of the proposed trust transfer prior to any approval.

The BIA exercises little or no control over land once it has been taken in trust. Under the Act it need assure itself only of its continued "beneficial use by the Indian occupant and his heirs." H.R. Rep. No. 1804, 73d Cong., 2d Sess. 7 (1934). Witnesses emphasized that if a parcel is located outside of reservation boundaries, a much more demanding scrutiny would be given to the trust proposal. With regard to the parcels in question, the BIA relied on the decision in *United States* v. *Washington*, 496 F.2d 620 (9th Cir.), *cert. denied*, 419 U.S. 1032 (1974), in establishing that all lay within existing reservation boundaries.

The Tribe produced the grantors and beneficial owners of the trust tracts in question, who described the tracts, the events surrounding each taking, and the policies and goals of the Tribe in general.

All of the tracts in question lie within the historic boundary of the Puyallup Reservation and within an outlying, nonindustrial area of Tacoma. The first tracts was purchased by the Tribe in fee simple from non-Indians with a grant from the State of Washington. The Tribe then transferred title to the United States in trust. Situated on this five-acre tract is the Kwatee Group Home, a modern facility used as a residence and day facility for troubled Puyallup and other Indian children. The Home was partially funded by state grants and receives referrals from state courts.

The second tracts, of 1.99 acres, was taken in trust for Roleen Hargrove, an enrolled Puyallup who was also the grantor. Ms. Hargrove bought the land with an inheritance of money that had been held in trust by the United States for her maternal grandmother.[2] The tract contains a small, wooden store, owned jointly with two other Puyallup women. The income from the store has been used largely, if not exclusively, for the benefit of the Tribe as a whole. The third tract is also held in trust for Ms. Hargrove, but is only 53 feet deep and borders on the main Hargrove tract and thus is of no independent significance.

The final tract in issue comprises about one-third of an acre. It was transferred to the United States by Marjorie Sterud, an enrolled Puyallup, to be held in trust for her son William. The tract has been in the Sterud family since its original allotment, and it is unclear how the land ever passed out of trust status. What is clear is that the land

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[2] Ms. Hargrove also owns an adjacent six-acre tract which the United States will not take in trust because it is encumbered by a mortgage.

was heavily encumbered and often been on the verge of distress sale. William Sterud worked to pay off the liens, and the land was accepted in trust. On it stands only a dilapidated shack which William hopes to convert into a decent home for his family.

What is missing from this necessarily short and sterile description is the pathos behind these attempts to restore trust land. The actors in these transactions are not wealthy individuals conniving ways to cheat the local government out of a tax dollar. They are not irresponsible illiterates creating disturbances and nonconforming structures in a downtown or industrial sector. They are self-respecting, and for that matter self-denying, people trying to preserve their tribe as a viable entity and to maintain themselves with a modicum of dignity and self-support. In one sense this is irrelevant because the BIA seemingly does not particularize these human factors when it decides whether or not to accept trust responsibilities. In the more important sense it is not: the Indian Reorganization Act was designed to assist tribes and enrolled members in just the circumstances here portrayed.

III.

Analysis of the legality underlying the disputed takings in question necessarily begins with the language of the statute itself. In relevant part section 5 provides:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.
>
> . . . .

> Title to any lands or rights acquired pursuant to [this section] shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

25 U.S.C. § 465 (1970). Each party to the lawsuit offers a different sweeping or narrow interpretation of this language and urges the Court to impose a definitive gloss on its meaning. The Court must decline this broad invitation. Only four of the many parcels in dispute are before the Court. Moreover, the Secretary has recently proposed regulations interpreting section 5 and setting forth the appropriate conditions to govern future acceptances of title to land in trust for Indians. 43 Fed. Reg. 32311 (1978). A definitive exegesis at this juncture would thus be both advisory in nature and an invasion of the province of the Secretary to interpret, at least as an initial matter, the meaning of the Indian laws. *See generally United States* v. *Jackson,* 280 U.S. 183 (1930). The Court is prepared, however, to rule on the validity of the particular takings in issue.

The legal basis of plaintiffs' opposition to the Secretary's action is fundamental. Arguing first from the face of the statute, plaintiffs emphasize that it authorizes trust takings only "for the purpose of providing land for Indians." Since the beneficial owners of all the trust land in question, or members of their immediate families, were also the grantors, they argue, the Secretary must have exceeded his authority. They suggest the Secretary could not be said to be "providing" land to Indians who themselves gave it to the United States. Moreover, plaintiffs argue, the legislative history of the Act indicates Congress' intention to limit its operation to takings for the benefit only of Indians who are landless or otherwise incapable of self-support.

Taking plaintiffs' latter argument first, it is sufficient to note that the words of the statute nowhere limit its application to landless, destitute, or incompetent Indians. The weight of the legislative history likewise support no such limitation. Congress was concerned with the overall problem of lost Indian lands and not with the resources of individual beneficiaries. The Act's House sponsor spoke on the floor in terms of tribes that had "lost *practically* every square foot of land" and "reservations [which] have in Indian ownership a *mere fragment* of the original land." 78 Cong. Rec. 11727-28 (1934) (Rep. Howard) (emphasis added). The goal of the Act was said to be "to build up Indian landholdings until there is sufficient land for all Indians who will beneficially use it." *Id.* at 11732. *See* S. Rep. No. 1080, 73d Cong., 2d Sess. 2 (1934). Repeatedly courts have approved trust takings in favor of Indians in no sense incapable of self-support. *E.g., Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145 (1973) (lease under § 5 to Tribe already in possession of 460,000 acres (BIA, Annual Report of Indian Lands 8 (1974)); *Stevens* v. *Commissioner,* 452 F.2d 741, 743 n.3 (9th Cir. 1971).

Plaintiffs' statutory argument—that the beneficial owner cannot himself provide the trust land—has a certain semantic appeal, and the Court itself, in its earlier Memorandum Opinion, expressed preliminarily its favor with such a generalized reading. Upon mature reflection, a closer analysis of the Act and its legislative history, and in light of the special facts underlying the disputed takings, however, the Court has concluded that plaintiffs' view is erroneous.

In the first place, on a literal level, the statute authorizes the Secretary to acquire land not only through "purchase, . . . gift, exchange, or assignment," but by "relinquishment" as well. By its very meaning "relinquishment" contemplates precisely the transactions engaged in here—a surrender of title by the grantor in favor of a *beneficial interest.* More-

over, construing the Act so as to preclude an Indian or Indian Tribe from itself providing the land to be held in trust would make it unlikely that land would ever be taken in trust and thus would frustrate legislation designed first and foremost to help Indians regain through their own efforts lost land and the means of self-support. One cannot read the debates surrounding the Act without appreciating the groundswell of sympathy for the losses suffered by the Indian Tribes as a result of earlier allotment and inheritance laws. Hand-in-hand went the determination by Congress that the United States should aid in the recouping of these losses by restoring land to an inalienable status.[3] Since Congress has rarely appropriated money for the purpose of trust land, reliance has rested upon the Indians themselves, as the only interested parties, to provide either the land or the money to buy land to be taken in trust for their benefit. The latter has already been given express judicial approval. *See Stevens* v. *Commissioner,* 452 F.2d 741 (9th Cir. 1971). To hold that Indians may provide money but not land to come within the protection of section 5 would be the rudest exhaltation of form over substance. As if it were necessary here, it is well to remember that "'[d]oubtful expressions are to be resolved'" in favor of the Indians. *Squire* v. *Capoeman,* 351 U.S. 6 (1956) (quoting *Carpenter* v. *Shaw,* 280 U.S. 363, 367 (1930)). The Court has no difficulty in holding that the Secretary may, in appropriate circumstances, take title to land to be held for the beneficial use of the very Indian or Indian Tribe that provided it.

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[3] For general statements as to the aims of the Act and the problems it sought to remedy, see, *e.g.,* 78 Cong. Rec. 11726-32 (1934) (Rep. Howard); letter from President Franklin D. Roosevelt to Sen. Burton K. Wheeler (Apr. 28, 1934), *reprinted in* S. Rep. No. 1080, 73d Cong., 2d Sess. (1934).

V.

Given its limited role in this overall lawsuit and the pendency of operative regulations, the Court will not proceed to detail what it considers to be "appropriate circumstances." Suffice it to say that the takings in questions do not even approach the periphery of the Secretary's discretionary power. The Puyallup Tribe, not long ago on the verge of extinction and even now with only a few acres of land, is a striking example of an entity drafters of section 5 sought to aid. The heroic efforts of the Tribe, through its members, to improve itself were well known to the Secretary, and his willingness to take in trust lands within the historic boundaries of the Puyallup reservation was neither arbitrary nor irrational. He proceeded well within his discretion.

The trust takings reviewed above were within the power of the Secretary of the Interior under 25 U.S.C. § 465 (1970); the Consent Decree shall no longer have force and effect; and each and all remaining issues in the case are transferred to the Western District of Washington. Judgment shall be entered accordingly.

So Ordered.

/s/ Gerhard A. Gesell
United States District Judge

September 19, 1978.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-438

ROLAND MCMASTERS, JACK SMITH, JR., WAYNE TURNER, ARLYN WADHOLM AND RUSSEL PEDERSON, *Petitioners,*

v.

BEULAH CHASE, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF OF PETITIONERS

THOMAS M. BEYER
17 Second Avenue West
Dickinson, North Dakota 58601
Attorney for Petitioners

Of Counsel:

TOBIN & COVEY
Suite 607
1150 17th Street, N.W.
Washington, D.C. 20036
November 1978

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REPLY BRIEF OF PETITIONERS

Pursuant to Rule 24(4) of the Rules of the Supreme Court, Petitioners submit the following materials in reply to Respondent's Brief in Opposition.

INTRODUCTION

Petitioners have demonstrated that the scope of § 465 is an issue of national importance. Pet. at 8. Respondent nowhere disputes the importance of this issue. In light of the expansive interpretation of this statute by the lower Federal courts, Petitioners seek review by this Court to properly resolve this issue and the others raised in the Petition. Moreover, the adverse impact of

the decision of the court below upon the municipality in which land was purchased and placed in trust necessitates review by this Court.

The City of New Town, North Dakota, has approximately 2,000 residents, twenty-five per cent (25%) of whom are Indian. The municipal boundaries of New Town are within the boundaries of the Fort Berthold Reservation.[1] Under the decision of the court below, the City must now provide certain municipal services

[1] Respondent argues that the boundaries of the reservation are irrelevant to the merits of this case. Br. in Oppos. at 4. As discussed by Petitioners, however, the Court of Appeals premised the jurisdictional foundation of its holding upon *Santa Rosa Band of Indians* v. *Kings County*, 532 F.2d 655 (9th Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977). Pet. at 6, n. 1. The *Santa Rosa* decision involved attempted land use regulation of § 465 trust land within a reservation, and reservation boundaries played a critical role in determining whether the State was precluded from exercising jurisdiction. Rather than address Petitioners' argument that reservation boundaries play a similar role in this case, however, Respondent argues that "the existing decision on the Ft. Berthold Reservation boundaries is correct. *City of New Town* v. *United States*, 545 F.2d 121 (8th Cir. 1972)." Br. in Oppos. at 4. To support this conclusion, Respondent notes that in *Long Elk* v. *United States*, 565 F.2d 1032 (8th Cir. 1977), the court below "found no diminishment [of reservation boundaries] under the standards of [*Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977)] of a reservation in North and South Dakota whose situation is similar in a number of respects to Ft. Berthold." *Id.* The comparison made by Respondent between the *Long Elk* situation and the Fort Berthold one is untenable. It is of course obvious that each reservation boundary case must be separately examined. *Rosebud Sioux Tribe* v. *Kneip*, 521 F.2d 87, 89 (8th Cir. 1975). Further, even assuming that the validity of boundary cases is dependent upon the existence of similar factors in other such cases, it is to be noted that a truly comparable reservation boundary case has been recently decided, under the *Rosebud* standards announced by this Court, in favor of disestablishment. *United States* v. *Dupris*, No. CR77-30056-01 (D.S.D., June 29, 1978).

to § 465 trust beneficiaries. No such arrangement, however, was ever contemplated by Congress in enacting the Indian Reorganization Act. Indeed, as the Commissioner of Indian Affairs, who was the primary administration spokesman and co-author of the Act, stated:

> By placing trust-barriers around Indian property, we exempted his land from State and local taxation. . . . States and local communities cannot furnish services without revenue. Once again, then, it becomes necessary for the Federal Government to assume an obligation toward the Indian tribes whose property it was seeking to protect.

Ann. Rep. of Sec'y. of Int. at 248 (1938). Although the Respondent offered to reimburse the City for water and sewer services, these services were denied because Respondent's land could not be assessed for collection of delinquent service charges. Petitioners are now required to provide these services although those who enacted § 465 never anticipated that agency officials would not seek to insure reimbursement to municipalities whose lands have been taken from their tax rolls.

The decision of the Court of Appeals can only serve as a greater impediment to the operations of the City of New Town. The jurisdictional problems confronted by the City from its location within a reservation are already of a debilitating nature. The severity of those problems, however, has been increased by the Secretary of the Interior. The City has, for example, been advised of an adverse impact on its municipal bond rating stemming from its inability to collect delinquent service charges on § 465 trust tracts.

Petitioners have illustrated that such administrative action is not of a unique nature. Pet. at 8. Further, the proposed new regulations concerning trust acquisition,

discussed *infra,* neither require that the Secretary assess the needs of those applying for trust lands, nor consider the jurisdictional impact of trust acquisitions upon States and their local governmental subdivisions. This situation will continue unabated until this Court properly limits the actions of the Secretary of the Interior.

I. PETITIONERS' CHALLENGE TO THE STANDARD OF REVIEW EMPLOYED BY THE COURT BELOW IS APPROPRIATELY RAISED IN THIS COURT.

Respondent argues that the Petitioners' challenge to the Court of Appeals' interpretation of 25 U.S.C. § 465 "is not appropriately presented for review by this Court". Br. in Oppos. at 3. This result is said to follow from Petitioners' attempt to seek a facial interpretation of § 465 in the courts below. *Id.* Respondent's characterization of Petitioners' challenge to agency action is without foundation. The instant suit was initiated on October 10, 1975. Respondent's Motion for a Preliminary Injunction was denied on December 20, 1975. Pet. at 14a. In the District Court's Memorandum Opinion, the Respondent's "right" under § 465 was eliminated as an issue in the case under the court's analysis of § 1983. Pet. at 18a. Although reference was made to § 465 in the Memorandum Opinion denying Respondent's Motion for a Permanent Injunction, (Pet. at 25a), the District Court had primarily viewed the case as one requiring an Equal Protection analysis. For the Petitioners to have attempted to create an administrative record in light of the District Court's disposition of the § 465 issue would have been without purpose.

Judicial review of agency action was not in issue in the District Court. Such review became an issue in the

Court of Appeals, however, when § 1983 was said to create a cause of action for violations of Federal statutory rights. Pet. at 7a. At that point, agency action taken pursuant to § 465 was properly reviewable. Instead of basing judicial review of agency action upon the administrative record and, thus, remanding the case to the District Court, the court below essentially conducted a *de novo* review of the propriety of the acceptance in trust under § 465. Such action was clearly prohibited under the decisions of this Court. Pet. at 9-11.

II. THE PROPOSED REGULATIONS OF THE DEPARTMENT OF THE INTERIOR REGARDING LAND ACQUISITIONS MERELY CONTINUE THE AGENCY PRACTICE CHALLENGED BY PETITIONERS.

Respondent asserts that the new regulations pertaining to 25 U.S.C. § 465, which have recently been proposed by the Secretary of the Interior, will supersede the administrative standards at issue in the present case. Br. in Oppos. at 3-4. In fact, examination of the proposed regulations, 43 Fed. Reg. 32311 (1978), reveals that they are no more than a proposed codification of the existing standards now in use by the Department of the Interior, and purportedly applied in the present case.

The fact that the proposed regulations are identical to the current administrative standards is most easily revealed by a comparison of the standards outlined in *City of Tacoma* v. *Andrus,* No. 77-1423 (D.D.C., Sept. 19, 1978), with the proposed regulations. In *Tacoma,* the court stated that the practice of the agency was to accept land in trust according to the following guidelines: (a) title to the land must be clear; (b) the proposed beneficial owner must be an enrolled member of a tribe; (c) the land must be within the boundaries of

the tribal reservation of which the proposed beneficiary is a member; (d) if the proposed beneficiary is not a member of the tribe for whom the reservation was established, the Tribal Council is to be notified of the requested transfer prior to its approval. Br. in Oppos. at 4a.

The focal section of the proposed regulations, § 120a.3, ("land acquisition policy"), incorporates these same standards without significant elaboration or clarification. For example, § 120a.3(b) provides:

> Subject to the provisions contained in the acts of Congress which authorize land acquisitions, "land" may be acquired by or for an "individual Indian" in a "trust or restricted status" when the "land" is located within the exterior boundaries of an "Indian Reservation", or adjacent thereto, or when the "land" is already in a "trust or restricted status".

Similarly, § 120a.12 requires that title to the land be clear, and § 120a.2(c) defines "individual Indian", in part, as an enrolled member of a tribe.

Thus, Respondent's statement that "the standards which defendants ask to be reviewed likely apply to very few official actions and only past ones", (Br. in Oppos. at 4), is patently incorrect. To the contrary, even assuming the proposed regulations are eventually promulgated, the similarity between the proposed regulations and the standards currently in use is so great as to constitute an unbroken line of consistent agency policy. Any decision regarding those standards, including the holding of the court below, and more importantly, the decision of this Court should certiorari be granted, will thus have wide-ranging effects on land

acquisition pursuant to § 465 even under the proposed regulations.

Respondent's argument is defective for another reason as well. The proposed regulations themselves require that all land acquisitions are "[s]ubject to the provisions contained in the acts of Congress which authorize land acquisitions. . . ." § 120a.3(b). This limiting clause is significant for two reasons: first, it indicates that the regulations are not exclusively limited to acquisitions made under § 465, but instead, are intended as broad guidelines to be tailored to the requirements of the particular statutory authority invoked; and, second, the regulations provide that any limitations contained in the authorizing statute itself must be regarded as limiting the policy guidelines in the regulations.

Respondent's argument that the proposed regulations will eliminate conflicts over land acquisition is thus without foundation, since those regulations do not even purport to address the specific question of the scope of § 465. Those regulations ignore the fundamental issue in the present case: whether, as Petitioners argue is required by the legislative history of § 465, the needs and landholdings of an individual Indian should be considered when a request is made for trust acquisition under § 465.

III. RESPONDENT'S CHARACTERIZATION OF THE JURISDICTIONAL ISSUE IS INCORRECT.

Petitioners have strongly and extensively argued that the court below erred in holding that Respondent stated a cause of action under 42 U.S.C. § 1983. Pet. at 23-34. Respondent's only reply to this controversial issue, however, is to state that the Court of Appeals was cor-

rect in its interpretation of § 1983. Br. in Oppos. at 7. The string citation following Respondent's terse statement contains cases which, as Respondent concedes, (Br. in Oppos. at 6), were exhaustively discussed in the Petition, and, Petitioners maintain, were adequately distinguished from the present case.

Respondent further argues that the court below had jurisdiction because of the existence of an Equal Protection claim that was not "completely devoid of merit". Br. in Oppos. at 7. Respondent fails to note, however, that the only reference by the court below to the Equal Protection claim was a footnote recognizing that Respondent did not present "a prima facie case of racial discrimination or of denial of a 'fundamental right' . . . ." Pet. at 11a, n. 8. In fact, the court below premised its holding on the existence of a valid cause of action under § 1983, based on the alleged denial of Respondent's rights under § 465. Pet. at 7a-8a.

It is thus unquestionably clear that the court below did not "proceed to decide the Supremacy Clause claim and to address it before the constitutional claim", as Respondent maintains. Br. in Oppos. at 7. Respondent is, in effect, imputing to the court below an analysis it did not apply. That attempt should not be allowed to cloud the significance of the genuine jurisdictional issue raised by Petitioners, that is, whether Respondent stated a cause of action under § 1983.[2]

[2] In fact, Respondent would have this Court ignore the Court of Appeals' ruling that § 1983 creates a cause of action for violations of rights conferred by 25 U.S.C. § 465. Pet. at 7a-8a. By arguing that the court below had jurisdiction to decide the merits of the claim, Respondent diverts attention from the precise holding of the court, and attempts to defend the court's actions on a ground which was not relied upon by the Court of Appeals.

IV. RELIANCE BY RESPONDENT ON A RECENT DISTRICT COURT OPINION IS MISPLACED.

In support of the interpretation of 25 U.S.C. § 465 by the Court of Appeals in this case, Respondent relies on the opinion of a Federal district court, *City of Tacoma* v. *Andrus,* No. 77-1423 (D.D.C., Sept. 19, 1978), and this Court's interpretation of 25 U.S.C. § 412a, in *Board of Commissioners* v. *Seber,* 318 U.S. 705 (1943). Br. in Oppos. at 5. As the analysis of the court below and the inapplicability of the *Seber* opinion have been fully discussed by Petitioners, (Pet. at 19-23), only the *City of Tacoma* opinion will be examined at this point.[3]

As a preliminary matter, it should be noted that the court in *City of Tacoma* intently reiterated that its holding was limited to the four specific tracts at issue in that case. Br. in Oppos. at 3a, 7a. The court's disclaimer of any intent to prescribe a comprehensive definition of § 465 thus indicates that any statements in the opinion relating to the parameters of the Secretary's authority under § 465 are in the nature of *dicta,*

[3] It is interesting to note the conspicuous absence of the § 465 analysis by the court below in Judge Gerhard Gesell's opinion of September 19, 1978, in *City of Tacoma.* The Court of Appeals opinion in this case was not cited in *City of Tacoma* even though it was filed on April 5, 1978, and a copy of the opinion was sent to Judge Gesell on April 24, 1978, by counsel for the intervening defendant in the *Tacoma* case. In fact, the only cases relied upon by Judge Gesell in specific support of his sweeping interpretation of § 465 were *Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145 (1973), and *Stevens* v. *Commissioner,* 452 F.2d 741 (9th Cir. 1971). Br. in Oppos. at 8a. These cases were cited to indicate court approval of trust acquisitions for Indians "in no sense incapable of self-support." *Id.* It is sufficient at this juncture to note that in neither case was an argument of the nature raised by Petitioners in this Court argued by the parties in those cases.

and relevant only in the context of the particular factual situations before the court. The brevity of the court's examination of the legislative history of § 465 may thus be explained as following from the court's reticence to articulate a general standard applicable to § 465 takings.

The court relies on various statements by one sponsor of the Indian Reorganization Act, Representative Howard, to support its conclusions concerning intended beneficiaries under § 465. There are essentially two problems in this part of the court's analysis. First, the statements form part of a comprehensive address by Representative Howard relating to the Indian Reorganization Act in its entirety, and it was in the specific context of explaining the adverse effects of the federal allotment policy that the particular remarks cited in the *Tacoma* opinion were made. Br. in Oppos. at 8a. Those remarks were actually part of a historical chronicle of events preceding the Indian Reorganization Act, and thus, were not related to the specific provisions of the Act. Similarly, the court quotes Representative Howard as defining the purpose of the Act as " 'build-[ing] up Indian landholdings until there is sufficient land for all Indians who will beneficially use it.' *Id.* [78 Cong. Rec.] at 11732." Br. in Oppos. at 8a. This statement, another in the same series of remarks by Representative Howard, is itself ambiguous, since it was intended as a characterization of the bill's purpose as a whole, and in no way detracts from Petitioners' position that § 465 was directed toward providing land for those Indians whose *needs* were such as to place them within the purview of § 465.[4]

[4] This summary of the goal of the Act by Representative Howard was cited by the court in *Tacoma* despite the numerous specific references to section 5 of the Act in the legislative history. *See* Pet. at 12-19. It was only in its January 20, 1978, Memorandum Opinion that the court referred to specific references in the legislative history to § 465. Pet. at 39a. It was perhaps this difference in focus which led the court to its precise interpretation of the statute on January 20, 1978, and its expansive and sweeping one on September 19, 1978.

Second, the court in *Tacoma* cites S. Rep. No. 1080, 73d Cong. 2d Sess. (1934), in support of its conclusions, when in fact, the Report is far more consistent with the construction of the Act offered by Petitioners. For example, the Report states:

> The purposes of the bill, briefly stated, are as follows:
>
> * * * * * *
>
> (2) To provide for the acquisition, through purchase, of land for Indians, now landless, who are anxious and fitted to make a living on such land.

Id. at 1. The Report specifically characterizes § 465 as follows:

> To meet the needs of landless Indians and of Indian individuals and tribes whose land holdings are insufficient for self-support, section 5 of the bill authorizes the purchase of lands by the Secretary of the Interior, title to be vested in the United States in trust for the Indian tribe for which the land is acquired. There is authorized to be appropriated not to exceed $2,000,000 in any one fiscal year for such purchase of land.

Id. at 2.

Additionally, Judge Gesell attached importance to the fact that § 465 authorizes relinquishment as one of the enumerated means of land acquisition under the

statute. Br. in Oppos. at 8a. Analysis of the court's statements, however, reveals that its reliance on the term is misplaced because the term was inappropriately construed on a literal level only, when in fact the term relinquishment is not subject to such summary interpretation.

In essence, the court in *Tacoma* implied that "relinquishment" is a term of art in the sense that it is to be given a uniform meaning regardless of the context in which it is used. That manner of interpretation is erroneous, however, as is revealed by examination of the other statutes in which it appears. As relevant here, "relinquishment" appears in 25 U.S.C. §§ 350 and 408.[5] Examination of these statutes reveals that relinquishment is in fact a general term, meaning nothing beyond a formal surrender of all interests in land. Rather than being a term of art, therefore, "relinquishment" is more properly considered a general term whose meaning is to be determined by reference to the particular context in which it is used.

Unlike Judge Gesell's interpretation, therefore, "relinquishment" must be defined by consideration of the purposes of § 465. The most reasonable interpretation, and one consonant with the legislative history of § 465, is that "relinquishment" in fact refers to the surrender by an allottee of his interest in an allotment for the benefit of his tribe, or another individual. The term is most reasonably construed as applying only to allot-

[5] Sec. 305 allows surrender and cancellation of patents in exchange for selection of new allotments; § 408 allows surrender of an allotment for the benefit of the allottee's children. Neither section allows surrender of legal title by an individual Indian in exchange for retention of the beneficial interest by the same individual.

ments because relinquishment was the sole means by which allotments could be transferred, since the inalienable status of the land prohibited transfer by any of the other means enumerated in § 465.

This interpretation is supported by the legislative history of § 465. As originally drafted, section 5, appearing as section 7 of Title III of the original bill, S. 2755, contained a separate clause relating exclusively to relinquishment. Section 7 provided in relevant part:

> The Secretary is authorized, in the case of trust or restricted lands or lands to which fee patents have hitherto been issued to Indians and which are unencumbered, to accept voluntary relinquishments of, and to cancel, the patent or patents or any other instrument removing restrictions from the land.

That section, which explicitly allowed surrender of fee patents by individual Indians in exchange for retention of a beneficial interest in the land, was deleted from the final version of § 465. Thus, "relinquishment" in the sense used by the court in *Tacoma* was removed from the Act, and nowhere in the legislative history is there any indication that the deleted clause was to be impliedly incorporated into the Act itself.

As noted *supra,* the most reasonable interpretation to be gleaned from the legislative history of § 465 is that relinquishment was intended to mean the voluntary surrender of all interest in land by an individual allottee, for the benefit of a third party. The interpretation of the term by the court in *Tacoma* thus must be recognized as erroneous, because it is inconsistent with the legislative history and purposes of § 465.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS M. BEYER
17 Second Avenue West
Dickinson, North Dakota 58601

Attorney for Petitioners

Of Counsel:

TOBIN & COVEY
Suite 607
1150 17th Street, N.W.
Washington, D.C. 20036

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